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DISSENTING FROM WITHIN: WHY AND HOW PUBLIC OFFICIALS RESIST THE LAW

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ABSTRACT

This Article examines why and how public officials consciously resist the laws and policies they are in charge of implementing. The Article argues that this phenomenon is not an anomaly, but rather pervasive and unavoidable. It occurs in all government institutions and is facilitated by the same structures that are designed to promote compliance.

The Article attempts to uncover the causes which render official resistance possible, arguing that resistance can be traced both to the limits inherent in the rule of law and to problems of institutional design. It then explores the strategies officials deploy to effectuate their resistance, ranging from blatant defiance to outsourcing resistance to private actors; from immunizing actions from judicial review to ordinary acts of interpretation and administrative prioritization.

The Article then turns to discuss the normative implications official resistance generates. While official resistance is often portrayed as undermining law, and therefore undesirable, such a position is simplistic and ignores the benefits it entails, in particular those for triggering public discourse, unblocking political channels, and policy change. The Article also considers the ways in which official resistance can contribute to more just outcomes and more efficient regulatory arrangements. This counterintuitive conclusion should lead us to reexamine our notions of the rule of law, compliance, and obedience. Consequently, the Article advances a more nuanced approach and suggests how to take resistance into account in the ex ante design of laws and policies and in the ex post application of enforcement and monitoring measures.

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I. INTRODUCTION

The standard picture of lawmaking and law enforcement envisions the legislature passing a law, agencies and courts implementing the law, individuals obeying the law, and compliance generally achieved.[1] Of course, most laws are not complied with to the fullest. Living in a society with limited enforcement resources means that some infractions will inevitably go either unnoticed or unenforced.[2] However, as long as the law is not violated most of the time by most citizens, the legal system is not considered to be in jeopardy.[3] This account, common and important as it is, is incomplete, for it overlooks the phenomenon of dissent within and among government institutions. Whereas dissent is usually conceptualized as being part of the private sphere and directed against state authority, such as civil disobedience and conscientious objection, the legal and political contestation that goes on within the state apparatus is relatively ignored.[4] Legal scholars and social scientists who study compliance tend to focus on how to effectively implement public policy[5] or on how to secure

1. *See* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 298 (1999) (describing the standard picture).

2. *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960) (exploring how certain crimes go unenforced based on the discretion of individuals such as law enforcement). On the role of prosecutorial discretion in the federal system, see, for example, Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 392 (2009).

3. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 741-42 (2009) (arguing that the gap between law on the books and law in action is widespread and usually does not threaten our legal system or constitute a constitutional crisis).

4. *See, e.g.*, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59 (2009) (noting the dearth of federalism literature on state resistance to federal authority).

5. *See, e.g.*, EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (Jeffrey Pressman & Martha Weinberg eds., 1977); MICHAEL HILL & PETER HUPE, IMPLEMENTING PUBLIC POLICY: GOVERNANCE IN THEORY AND IN PRACTICE 42 (2002); Lawrence Baum, *Comparing the Implementation of Legislative and Judicial Policies*, *in* EFFECTIVE POLICY IMPLEMENTATION 39 (Daniel A. Mazmanian & Paul A. Sabatier eds., 1981).

the compliance of citizens and regulated industries.[6] They think much less about securing compliance of public officials. And even when they do, they typically address structural issues such as institutional design, underperformance, delays and costs.[7]

This Article focuses on another, less explored, type of official behavior, which I term *official resistance*. Resistance is not merely behavior confined to the private realm, vis-à-vis the state, of individuals not complying with laws. Resistance is also practiced by state agents against their own institutions or by governmental institutions against other, superior institutions. Moreover, resistance is not a uniform type of behavior that is immediately apprehensible. It is a spectrum of behaviors, ranging from open defiance to calculated acts of noncompliance and to more covert forms of expressing disagreement. Official resistance, however, has not drawn sufficient attention in contemporary legal scholarship.

Consider, for example, the paradigmatic case of civil disobedience in the United States—the civil rights movement.[8] Despite the abundance of literature, much less attention has been given to the forms of resistance deployed by public officials in their attempts to resist *Brown v. Board of Education* and its progeny.[9] A voluminous literature has documented these acts,[10] but we have yet to think in a comprehensive manner or theorize the phenomenon itself, as opposed to noting its occurrence. Moreover, the literature that does address official resistance often focuses on resistance to court decisions, downplaying the more general phenomenon of resistance.[11]

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6. *See, e.g.*, KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION (1984) (discussing compliance with environmental regulation); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (examining what makes law compliance legitimate in the eyes of individuals); James Andreoni et al., *Tax Compliance*, 36 J. ECON. LITERATURE 818 (1998) (discussing compliance with tax laws). For exceptions, see BARDACH, *supra* note 5 and Farber, *supra* note 1, at 300 (arguing that the "problem of obtaining compliance . . . is pervasive" and that "[i]t deserves much more attention than it has received").

7. *See, e.g.*, BARDACH, *supra* note 5, at 5.

8. Although a large part of that movement was not characterized by illegal resistance, it did encompass illegal activities such as demonstrations without permits and sit-ins.

9. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

10. *See, e.g.*, KAREN ANDERSON, LITTLE ROCK: RACE AND RESISTANCE AT CENTRAL HIGH SCHOOL (2010); NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290-442 (2004).

11. *See, e.g.*, KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 9 (1971) (acknowledging that the authors are only examining resistance to court decisions). Similarly, Michael Klarman's work on backlash focuses on resistance to courts, and his writing on official resistance is a corollary of that. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash*

This Article aims to fill this gap by making two overarching arguments. First, official resistance is a complex phenomenon that can and does occur in every institution, from federal administrative agencies to local municipalities. In that sense, it is both pervasive and inescapable. Indeed, official resistance can be so embedded in the governmental scheme that it will either go undetected, considered to be routine, or there will be significant costs, political or other, for those who contemplate bringing action. These claims are not necessarily empirical (although illustrative examples are provided throughout), but rather flow from the nature of a legal system, from institutional interactions, and from the background structures in which governmental institutions operate. Resistance, then, is inherent to public institutions. Second, it is not only institutional structures that generate official resistance; inherent and irresolvable tensions between the rule of law and human agency provide officials with opportunities to resist the laws they are in charge of administering.

Institutional design can contribute to the heightening of the tension between the rule of law and human agency. However, whereas institutional design can alleviate the tension, it cannot eliminate it completely. Indeed, the same mechanisms that seek to guarantee compliance with the law, such as the rule of law and organizational hierarchies, are the ones which also facilitate its violation. Paradoxically, eliminating official resistance means giving up on the rule of law. In a world without rules, there will be no resistance to rules. But since no state can operate without rules, resistance will never disappear.

Drawing on a diverse body of literature, from legal theory and sociology of law to organizational sociology and political psychology, this Article argues that our portrayal of official resistance as inherently wrong and undesirable is simplistic and often misguided. Indeed, official resistance generates questions that have long been neglected by legal scholars, in particular its role in legal theory, political life, and institutional design. For example, whether there is an obligation to obey the law is a perennial question in legal theory; the corresponding obligation of public officials is either assumed or not discussed. In politics, officials resisting the law are often negatively portrayed, but the beneficial impact resistance has on unblocking clogged political channels and triggering political discourse is ignored. Similarly, scholars rarely acknowledge how official acts of resistance can lead to more just outcomes or more efficient arrangements. Indeed, the role official resistance plays in policy change is

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Thesis, 81 J. AM. HIST. 81 (1994); *see also* James P. Levine, *Methodological Concerns in Studying Supreme Court Efficacy*, *in* COMPLIANCE AND THE LAW: A MULTI-DISCIPLINARY APPROACH 99 (Samuel Krislov et al. eds., 1972) (suggesting a conceptual framework for investigating noncompliance with court decisions).

one that is seldom contemplated, let alone theorized. Finally, official resistance implicates issues of institutional design. If resistance has beneficial as well as harmful consequences, institutional design must be sensitive to its occurrence, both in the ex ante design of laws and policies and in the ex post enforcement stage of official misconduct.

Accordingly, this Article proceeds as follows. Part II will distinguish private resistance from official resistance and define the scope of official resistance. Part III will discuss what makes official resistance possible. I provide two explanations: individualistic and institutional. Individualistic reasons tend to focus on the role of human agency in official resistance and why officials might choose to resist the law. Institutional reasons take into account the structure of institutions and their interactions. Combining these reasons leads to the conclusion that the concept of rule of law, when understood descriptively, often mischaracterizes the operation of the legal-governmental system. Given that official resistance exists, Part IV asks how it is instantiated. Specifically, I examine the strategies that officials and institutions deploy when they translate their desire to resist into action. Although there can be many strategies, I focus on those that I take to be most salient. Part V discusses the implications resulting from the foregoing analysis. Part VI concludes.

II. WHAT IS OFFICIAL RESISTANCE?

A. Official Resistance vs. Private Resistance

We are accustomed to think of resistance to law as pitting citizen against government. Henry David Thoreau referred to government officials as either "wooden men," machines with no judgment, or as "serv[ing] the Devil, without *intending* it, as God."[12] Martin Luther King, Jr., in *Letter from Birmingham Jail*, discussed the duty to obey just laws and the moral responsibility to disobey unjust laws.[13] Mahatma Gandhi's philosophy of Satyagraha (loosely translated as the force of truth) consisted of nonviolent resistance to unjust laws.[14] To be sure, Thoreau, King, and Gandhi were writing about the problems of their time. Thoreau refused to pay taxes because of his opposition to the Mexican-American War and to slavery. King was resisting the segregationist regime in the South, and Gandhi used Satyagraha as a means to fight the colonialist British Empire. Still, what the three had in common is the assumption that resistance is actuated by pri-

12. HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 267 (George Stade ed., Barnes & Noble Classics 2003) (1849).

13. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 84 (1964).

14. George Hendrick, *The Influence of Thoreau's "Civil Disobedience" on Gandhi's Satyagraha*, 29 NEW ENG. Q. 462, 464-65 (1956).

vate individuals protesting an unjust action by the state.[15] As a result, their focus was on whether and when an individual has a right or an obligation to resist the law.

At the same time, political and moral philosophers who have written on dissent also tend to portray the state as a unitary actor with a coherent hierarchical structure.[16] Indeed, those who are contemplating resistance will usually not care too much whether they are violating a federal statute, an administrative policy, a local ordinance, or a judicial decision. What they are concerned with is resisting a state order in the form that it appears before them. Of course, the sanctions for violating different types of legal orders might be different, as are the chances of being caught and the impact of the act, but so long as the resister considers only the moral justifications, it is unlikely that the source of the legal directive would control her decisionmaking.[17] For the resister, it is sufficient that the directive emanates from the state, and for the most part the state will be perceived as a unitary entity.

Official resistance challenges both of these aspects. First, it is, by definition, not exercised by private individuals. Second, it takes into account the role conceptions of public officials who resist, given their institutional location and the way in which they interact with other institutions. These points provide for three distinctions between official and private resistance.

First, official resistance can only be practiced by public officials. These can be elected officials, but it also encompasses nonelected officials, most notably administrators and members of the bureaucracy. Although elected officials might differ from nonelected officials in terms of their incentives for particular actions, both of these types of officials have something in common. Namely, they are state agents who are authorized to exercise state power. Unlike private citizens, they do not just have an opinion on a matter of law or policy, but are legally vested with the power to act on these matters and are duty-bound to exercise the powers given to them.[18] Public officials,

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15. The same position is taken by JOHN RAWLS, A THEORY OF JUSTICE 319 (rev. ed. 1999).

16. *See, e.g.*, Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an "It,"* 96 MINN. L. REV. 194, 203-15 (2011) (discussing unitary state theories in natural law and international relations). The inclination to think of the state as a unitary actor is common. *See generally* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999). There are exceptions, though. Martin Luther King discussed the need to obey the "just decision" of the Supreme Court in *Brown* and to resist the unjust segregationist laws in the South. *See* KING, *supra* note 13.

17. It is true that consequentialist considerations will play a role. The expected sanction will probably be taken into consideration, but there is no necessary correlation between the severity of the sanction and the legal source from which it emanates.

18. *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1754-65 (2005).

then, have a special relation to the law, for they are in charge of administering it.[19] They take oaths to uphold it, making their fidelity to law explicit.[20] Moreover, public officials, unlike private citizens, embody a role conception of officials. They consider themselves as public-regarding, serving the public interest and performing a role which goes beyond self-interest. They view their role as officials entrusted with state power, and uphold themselves, at least in terms of role conception, to certain duties, such as being public-regarding and maintaining the rule of law.[21] To be sure, private citizens also view themselves, at times, as public-regarding. However, as Bruce Ackerman noted, this is more likely to occur during "constitutional moments"—times of high political saliency when citizens suspend self-interest and act in the interests of the polity.[22] Yet these are just "moments," whereas we expect officials to consistently have a distinct role conception.

It is not merely the role conception of officials themselves that makes official resistance unique. It is that we, as a society, have different expectations from public officials than we do from private actors. The state and, by extension, its officials are different. The state needs special justifications for its legitimacy. There are things that only it can do, such as a monopoly over the use of force, and things that it cannot do.[23] Similarly, we believe that state actors and institutions should not be motivated by the same reasons as private entities. We accept that private actors are at least partially motivated by self-interest and profit maximization, but public officials who put their own interests ahead of the public interest violate their duty to us, the citizens. Consequently, such motivations will usually be suspect. This understanding is reflected in constitutional doctrine, where the identity of the actor often determines the constitutionality of the act.[24] True, public choice theorists often portray public officials

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19. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608-09 (1986) (explaining that there is a difference between punishment by people and its administration by officials).

20. David Lyons, *On Formal Justice*, 58 CORNELL L. REV. 833, 858-59 (1973).

21. For a fuller analysis of role conception and public service motivations see James L. Perry et al., *Revisiting the Motivational Bases of Public Service: Twenty Years of Research and an Agenda for the Future*, 70 PUB. ADMIN. REV. 681, 681-82 (2010) (identifying public spiritedness, altruism, and prosocial attitudes among public service workers). Perhaps the most extreme case of role conception is the willingness of antislavery judges to uphold fugitive slave laws. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119-30 (1975).

22. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

23. MAX WEBER, *Politics as a Vocation*, *in* THE VOCATION LECTURES 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans. 2004).

24. *Compare* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (finding no state action, thus permitting the Lodge to discriminate against blacks), *with* Burton v. Wilming-

as self-interested utility maximizers,[25] but even if they are descriptively correct (which is debatable),[26] such behavior must still be normatively justified.

Second, official resistance happens with due regard to its institutional context. Indeed, the decision whether to resist or not takes into account the institutional location of the resister, be it an individual or an institution. It will usually come after a calculation of the costs and benefits of such resistance and the various strategies of making it feasible. These strategies will be uniquely related to the official role. For example, an administrative agency that is under a duty to implement legislative reforms might resist such reforms for various reasons. Its mode of resistance, however, will not be simple defiance since that is unlikely to succeed. Rather, it will depend on the particular interactions between the agency, the legislature, the courts, and the people, features that the private resister lacks.[27] Moreover, public officials have tools in their toolkit that ordinary citizens do not. Of course, this does not mean that private resistance takes place in an institutional vacuum. It is only to say that official resistance takes place in a different institutional setting, which also affects the incentives officials and institutions confront when considering resistance.

The third difference between private and official resistance has to do with its consequences. If it is the case that official resistance has importantly different implications, for example, for how citizens perceive the legitimacy of the state, for the stability of the legal system, or for the harm that results from acts of official resistance as opposed to private resistance, there might be a different threshold for justifying such resistance, if there is any at all. The consequentialist perspective suggests that the conceptual distinction between private and official resistance can be maintained in virtue of the position of the official—being an authority in his or her field and exercising state power.

These differences demonstrate the need to think of official resistance as a separate category of analysis. Although the dominant position embraced in the literature views official resistance as a type

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ton Parking Auth.*,* 365 U.S. 715, 725 (1961) (finding state action, thus prohibiting the exclusion of blacks from the restaurant).

25. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *Introduction: A Brief Trajectory of Public Choice and Public Law*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 1 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

26. *See, e.g.*, Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1140; Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 916 (2005).

27. *See, e.g.*, Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can't) Do to Limit Judicial Review*, 52 B.C. L. REV. 1687 (2011).

of civil disobedience or conscientious objection,[28] that view is mistaken. To be sure, some aspects are shared, but when resistance is practiced by officials, it implicates values and principles that simply do not exist, or exist to a lesser extent, in instances of private resistance.

B. Defining Official Resistance

Private resistance that is not self-interested lawbreaking has usually been conceptualized as comprising two types of phenomena: civil disobedience and conscientious objection. According to John Rawls, civil disobedience is a public act that is done in public, engaged in openly with fair notice, not covert or secretive, which entails invoking the convictions of the community.[29] In conscientious objection, on the other hand, one simply refuses, for moral reasons, to comply with an order addressed to him. It is not an appeal to the sense of justice of the majority, and unlike civil disobedience conscientious objection is not necessarily based on political principles.[30] Unlike civil disobedience, which, under some conceptions, has to be public, or conscientious objection that invokes outright refusal, official resistance can be both. It is sometimes public, but very often it is not. It will sometimes manifest in explicit refusal but will often take on more covert forms.

1. What is Official Resistance?

In my definition of official resistance, there needs to be a subjective motivation to resist the law. An official must first decide to resist the law or policy in question, or that she is at least interested in exploring the possibilities of resistance, without committing herself to full-blown disobedience. Resistance can work itself into devising strategies and finally culminate in an actual behavior that is perceived as disobedience.

But what does it mean to resist the law? If law is subject to interpretation, can we ever really say that an official is resisting as opposed to interpreting the law in a way that meets her preferences? Under my definition, resistance is a state of mind stemming from a subjective motivation.[31] It is dissatisfaction with what the official or

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28. *See, e.g.*, Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 178 (2007) (conceptualizing resistant judges as engaging in "civil disobedience").

29. RAWLS, *supra* note 15, at 320.

30. *Id.* at 323-24.

31. Another sense of resistance is resistance by omission. For example, after the invalidation of school mandated prayer in *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District v. Schempp*, 374 U.S. 203 (1963), many schools continued practicing the prohibited policy. Officials refrained from finding out exactly what the Court said, and some observers suspected that local communities maintained the old practice. *See* DOLBEARE & HAMMOND, *supra* note 11.

institution perceives to be the law. Law, then, does not present itself to the official as a hard social fact. What the law is, for the official, is the result of her engaging with the legal material—the outcome of the "work" she puts in.[32] On this view, indeterminacy is not a property of words, but rather the interaction between the legal actor and the text she is attempting to interpret.

This does not mean that at any given point every rule is indeterminate in the sense that its application will yield an unpredictable result. Many rules are not questioned as a matter of course—think of traffic laws. The reason traffic laws are predictable is precisely because the lawyer class does not think that at present arguments undermining these provisions will succeed, or that there is a need to raise them. Thus, a legal provision can be determinate when a lawyer cannot make a respectable (as opposed to frivolous) argument against it. However, given the concept of legal "work," almost all provisions are susceptible to respectable arguments, meaning an argument made by a socially significant set of actors.[33] As Michael Freeden has argued more generally, "[t]o invent a new usage, or to employ an aberrant one, is subject only to one test: is it acceptable, or is it in the process of becoming acceptable, to a significant numbers [sic] of its users?"[34]

Resistance in the sense I am using here is derived from this approach. The official encounters a legal command and, after doing some work trying to figure out what the law demands of her, decides she would rather not comply with what she takes the law to be saying. This point is not trivial. In a recent article, Frederick Schauer posits the question: "[D]oes law constrain official action?"[35] But phrased as such, the question is misleading. Schauer seems to assume that law presents itself to the public official as a hard social fact or as a clear directive from a superior institution. But as a phenomenological matter, this is not the case, or at least not always the

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32. This relies on the sociological indeterminacy thesis, which has been developed separately by Duncan Kennedy and Mark Tushnet. By adopting a sociological angle, Kennedy and Tushnet focus on the work legal actors do when they confront a legal text. They argue that indeterminacy is not a property of words, but rather the interaction between the legal actor and the text she is attempting to interpret. *See* Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, *in* LEGAL REASONING: COLLECTED ESSAYS 153 (Gianni Vattimo & Santiago Zabala eds., 2008); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Mark V. Tushnet, *Defending the Indeterminacy Thesis*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 223 (Brian Bix ed., 1998).

33. *See* Tushnet, *supra* note 32, at 228.

34. MICHAEL FREEDEN, IDEOLOGIES AND POLITICAL THEORY: A CONCEPTUAL APPROACH 53 (1998).

35. Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769 (2010).

case. Law is an interpretive concept. When officials and institutions dislike what they think the law means, they will try, if they have the resources such as time and ability, to work the law into what they believe it should say. Resistance, then, is the starting point for official action. It is a mental state,[36] the instantiation of which translates into real action. It can, for example, culminate in outright defiance. While such acts will be rare, given the significant political costs,[37] they still occur, as was the case in Southern official resistance to desegregation.[38] More often, however, resistance will take on relatively covert forms. These and other types of official behavior are explored in Part IV, but for purpose of illustration I now provide two examples.

2. Two Examples of Official Resistance

In February 2004, the mayor of San Francisco, Gavin Newsom, instructed his county clerk to issue marriage permits to gay and lesbian couples. Aware of a California statute stating that only marriage between a man and a woman is valid or recognized in California,[39] Newsom went ahead anyway, asserting that according to his understanding, the California Constitution guaranteed an equal protection of the laws and thus barred discrimination in such matters.[40]

While some citizen groups opposed the initiative on rule of law grounds,[41] the initial response of the California Attorney General's office was more equivocal. When asked whether the marriage certificates issued were legal, the response was "[w]e don't know."[42] Public reaction was also confused. The San Francisco Chronicle wrote that San Francisco "defied the law" and that it was an act of "civil

36. By this I mean that for the outside observer it will often be difficult to perceive whether resistance is going on. At least in the outset, only the official knows she is resisting, whereas others might think that the resistant interpretation is otherwise correct.

37. Levinson & Balkin, *supra* note 3, at 724. *But see* Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004) (arguing that extreme and exceptional cases might require public officials to go beyond the legal order and accept the legal ramifications for their actions).

38. Such resistance was often couched in the language of offering competing legal interpretations, but often it was expressed in language which refused to comply with Court decisions. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); ANDERSON, *supra* note 10; MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 240 (1994); N.V. Bartley, *Looking Back at Little Rock*, 25. ARK. HIST. Q. 101 (1966).

39. CAL. FAM. CODE §§ 300, 301, 308.5 (2003).

40. Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24.

41. *Id.* ("Mathew D. Staver, president and general counsel of Liberty Counsel, the lawyers for the group that plans to sue, said the marriage certificates issued Thursday were 'not worth the paper they are written on.' He added that Mr. Newsom was 'giving the impression that mayors are above the law.' ").

42. *Id.*

disobedience,"[43] failing to note that San Francisco city officials are not exactly part of the "civil" in civil disobedience. San Francisco officials rested their claims with the California Constitution and other state court decisions, most notably Massachusetts, which held that barring gays and lesbians from marrying is discriminatory.[44] They did this despite the California Constitution's prohibition on administrative agencies from declaring state laws unconstitutional or unenforceable in the absence of an appellate court determination.[45]

The events in San Francisco demonstrate how the desire to resist translates into various actions. In the beginning, apparently after hearing President George W. Bush's State of the Union Address praising the Federal Defense of Marriage Act,[46] Newsom decided to resist the law that prohibited same sex marriages in California, believing that the California Constitution (and the people of San Francisco, his constituents) was on his side.[47] At the same time, it was obvious to all involved, including Newsom, that by granting marriage permits he was resisting the California statute. Newsom took action by issuing marriage permits, relying on a legal move that in all likelihood he could not believe was tenable. Indeed, the Supreme Court of California ordered San Francisco to stop issuing marriage permits, holding that absent a declaration of unconstitutionality by an appellate court, San Francisco could not choose to disregard state statutes.[48] The substantive question, whether the statutes were unconstitutional, was postponed to another day.[49] After the 2004 decision, Newsom decided to acquiesce rather than maintain his noncompliance by pursuing the matter further. He further decided not to continue issuing marriage permits, which, in light of the then exhaustion of legal remedies, would have found him disobeying.[50]

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43. Rachel Gordon, *S.F. Defies Law, Marries Gays / Legal Battle Looms: City Hall Ceremonies Spur Constitutional Showdown, Injunction Threat*, SFGATE (Feb. 13, 2004), http://www.sfgate.com/news/article/S-F-defies-law-marries-gays-LEGAL-BATTLE-2823284.php.

44. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

45. CAL. CONST. art. III, § 3.5 (Deering, LexisNexis through 2013 Supplement).

46. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

47. EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 227-28 (2010).

48. Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 499 (Cal. 2004).

49. In 2008, the California Supreme Court held that

> the right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.

In re Marriage Cases, 183 P.3d 384, 433-34 (Cal. 2008).

50. As is well known, California voters then passed "Proposition 8," which reverted to the situation ex ante. Since litigation is still going on, it remains to be seen what will

Another story brings these tensions even more sharply into focus. In the nineteenth century, land titles in Kentucky were in disarray, owing to "notorious land distribution schemes."[51] At the same time, the federal government wanted to sell land in the West to speculators. Local residents who lived near the parcels resisted this, because they wanted the land for themselves and their communities.[52] To combat the federal plans, local residents resorted to squatting on the federal lands. The local governments, who wanted to support the illegal squatters, enacted laws that made it easier for squatters to dispossess private absentee owners (those who got the land from the federal government).[53] State courts also assisted squatters against the plans of the federal government.[54]

Under the 1792 Virginia-Kentucky Compact, which established the state of Kentucky from lands previously owned by Virginia, land titles were to be "determined only by the laws of the State under which they are acquired," meaning Virginia's.[55] Displeased with federal designs and with its haphazard land schemes, Kentucky enacted its own version of occupying claimant laws, which basically extended to squatters (those without color of title) the statutory protection afforded to untitled settlers with color of title.[56] This meant that ejected squatters would have to be compensated for improvements and crops. Kentucky courts routinely upheld this protection, but the Supreme Court, in *Green v. Biddle*,[57] held the law unconstitutional as a violation of the Contracts Clause. The decision was met with severe opposition led by Kentucky's two senators, Henry Clay and Richard Johnson.[58] Clay requested a rehearing, which was granted, but to no avail. The new decision upheld the original decision.[59]

Even before the second *Green* decision there was widespread official resistance. The Kentucky House declared the decision to be a "hoax" and defended the invalidated Kentucky laws.[60] Senator Richard Johnson went as far as to propose a constitutional amendment

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happen. Recently, the 9th Circuit decided that the ban on same sex marriages is unconstitutional. *See* Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144).

51. The following account draws on DWIGHT WILEY JESSUP, REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 1809-1835, at 213-31 (1987).

52. PEÑALVER & KATYAL, *supra* note 47.

53. For examples, see *id.* at 60-62.

54. *Id.* at 61.

55. Green v. Biddle, 21 U.S. (8 Wheat.) 1, 12 (1823).

56. JESSUP, *supra* note 51, at 215.

57. *Green*, 21 U.S. at 12.

58. JESSUP, *supra* note 51, at 217-18.

59. *Id.* at 219-20.

60. *Id.* at 217.

that in cases of a judicial controversy the Senate shall have appellate jurisdiction, denouncing the Supreme Court as "an 'irresponsible' federal agency enlarging national power at the expense of state sovereignty."[61] Things were not helped by the second *Green* decision. Kentucky continued to resist and enforced its invalidated statutes. Kentucky courts routinely ignored *Green* and continued to enforce the invalidated state law, holding it as consistent with both the Virginia Compact and the Federal Constitution.[62] In time, the federal government came around. Unlike today, nineteenth century American bureaucracy possessed little enforcement resources, making resistance by local officials much easier. Realizing it could not protect absentee owners and speculators, the federal government legalized what was previously illegal by changing federal laws, "shifting from the use of public land for revenue and toward the direct distribution of land to actual settlers."[63] This culminated with the 1862 Homestead Act, which provided free acquisition of land by those who lived on the land for five years and improved it.[64]

Similar to San Francisco, Kentucky attempted to offer a legal interpretation of the relevant texts. However, unlike San Francisco, when Kentucky's interpretation was denied in the Supreme Court, and the Kentucky statutes invalidated, state officials chose not to acquiesce, but escalated their attack to full-fledged defiance. These two examples hint at the why and how of official resistance. But now a deeper explanation is required, one that goes to the heart of the legal system and seeks to understand why such cases happen and will inevitably continue to happen.

III. WHAT MAKES OFFICIAL RESISTANCE POSSIBLE?

Two factors explain resistance on both the individual level (conflict between the rule of law and human agency) and the institutional level (instability of hierarchy, resistance to change, and institutional identity). As I argue at length below, resistance exists partly because the very mechanisms that are otherwise instituted to induce compliance are the ones that render resistance possible.

To be sure, there are many varieties of official resistance. Resistance by administrative agencies to court decisions is different from resistance of mayors to the same. Resistance by cities to state statutes is different from resistance by states to federal statutes. And

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61. *Id.* at 218-19.

62. PEÑALVER & KATYAL, *supra* note 47, at 61. *See, e.g.*, Bodley v. Gaither, 19 Ky. (3 T.B. Mon.) 57, 59 (1825), *cited in* JESSUP, *supra* note 51, at 222.

63. PEÑALVER & KATYAL, *supra* note 47, at 62-63.

64. *See* Act of May 20, 1862 (Homestead Act), Pub. L. No. 37-64, § 392 (repealed 1976).

all of those are different from lower court resistance to the Supreme Court.[65] In each case, it matters who is resisting and toward what end. I do not slight such important distinctions. And yet, at a sufficient level of abstraction, there are commonalities such that the overall category of official resistance is useful to keep in mind, even if it varies from institution to institution and is motivated by different concerns, incentivized differently across institutions, and deployed in different ways.[66] Developing a unified category, then, makes disparate practices that are a salient feature of official behavior intelligible and, as such, it gives us greater insights into the causes and effects of social practices that have legal significance.

This Part will shed light on two sets of arguments that seek to explain what makes official resistance possible. By this I mean, what are the causes that provide the space for such behavior rather than the particular reasons an official resists. Officials might resist because they stand to gain from resistance, such as political or reputational capital, or because resistance makes their job easier in some way. This is not the question that I am asking. Instead, I am concerned with what renders resistance possible; what is it about the legal system that enables resistance to come forward and assume a place in the repertoire of official behavior?

Perhaps unsurprisingly, officials resist the law because they can. Lest this seem simplistic, let us break the argument into two parts. The first argument is that there are inherent and irresolvable tensions between the ideal of the rule of law and the fact of human agency, which make official resistance unavoidable. The rule of law asks officials to put aside their notions of right and wrong and to act according to the rules enacted by others.[67] In other words, it demands supremacy.[68] But the rule of law (like any rule) is not self-applying. Officials must mediate between the law and government actions. Officials, however, have agency. They have their own preferences to

65. *See, e.g.*, Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes:* Miranda *and* New York Times *in the United States Courts of Appeals*, 43 W. POL. Q. 297 (1990) (suggesting that resistance by federal courts to Supreme Court decisions is less than that of state courts to the same); *see also* Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1022 (1959) (arguing that federal court defiance is less likely than state).

66. *See* Baum, *supra* note 5 (arguing that the bifurcation that separates the implementation of legislative policies from judicial policies works against the development of a general understanding of policy implementation).

67. There are rare exceptions to this rule, such as in the case of a patently unconstitutional law. *See* Robert G. Vaughn, *Public Employees and the Right to Disobey*, 29 HASTINGS L.J. 261 (1977).

68. The demand of supremacy does not stem from the idea that the rule of law is itself an ideal, but rather because obedience is thought to be the best instrument of achieving the goals the law wants to pursue. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 229 (1979).

further, and those may come into tension with the rule of law. Moreover, that tension is pervasive and goes all the way down. This is because, as I argued above, public officials have a role conception not just of automatons, but also as those instilled with fulfilling some type of public goal, one that may come into conflict with the rule of law.

The second argument concerns institutional design. It speaks to the design of governmental structures, mainly, but not only, bureaucracies, which renders resistance possible and inevitable. This argument is broad, so I will break it down to several components. Although my two overarching arguments (rule of law and institutional design) are freestanding, they often work together. For example, an agency official will find herself as part of a hierarchical organization but also endowed with human agency. The way the two interact generates the particular type of resistance discussed in Part IV.

A. The Argument from the Rule of Law

Law is a system that exercises authority on individuals and institutions alike.[69] Moreover, law aspires to exercise the most power on those who are directly subordinate to it and are in charge of implementing its demands, i.e. public officials. Public officials get paid to do what the law requires; they are rewarded with financial benefits, and enjoy institutional esteem and prestige. Thus, it would seem that there is a strong, if not the strongest, incentive to comply with the law, with the directives of superior officials and those of superior institutions.[70] Why, then, does official resistance happen?

There are many explanations as to why public officials might choose to disregard the law. Divergent policy preferences among governmental units play a large role in explaining resistance. Moreover, if officials and institutions disagree with a certain policy and think they can resist it and also escape sanctions, resistance becomes more likely.[71] Still, such explanations fail to capture what makes all of this

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69. *Id. passim* (discussing the meaning of law's claim to authority); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 6-8 (1832) (introducing the command theory of law); *see also* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (criticizing Austin). Note, however, that even when taking into account Hart's "power-conferring rules," law is still a system that exercises authority. On the Hartian version, people elect to comply with the power-conferring rules precisely because doing so bestows legal validity on their actions. *Id.*

70. ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 189 (Eden & Cedar Paul trans., Transaction Publishers 1999) (1915) (arguing that the bureaucracy is staffed by an "army of slaves who are always ready, in part from class egoism, in part for personal motives . . . , to undertake the defense of the state which provides them with bread").

71. This is the rational choice perspective. *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) [hereinafter DOWNS, AN ECONOMIC THEORY]; ANTHONY DOWNS, INSIDE BUREAUCRACY (1967) [hereinafter DOWNS, INSIDE BUREAUCRACY]; James F. Spriggs, II, *Explaining Federal Bureaucratic Compliance with Supreme Court*

possible in the first place. Conceptually, the fact that a subordinate unit of government thinks differently than its superiors should not matter at all. Once the policy has been determined and promulgated, dialogue ends and implementation begins. Indeed, the rule of law exists precisely to preclude the possibility of official resistance.

Although the idea of the rule of law is contested,[72] there is some consensus among scholars.[73] Namely, the state and its officials are limited by law. Laws must be complied with not only by their subjects but also by those that make them or enforce them, until they are changed, and only then through the proper procedures. Laws must have certain characteristics for them to be valid. They must be general, applied equally, and certain. The idea animating this theme is one of predictability. Laws must be able to guide behavior, and people have a right to expect that law will remain certain, stable, and predictable, so that they can plan their actions.[74] Finally, the rule of law is understood in contradistinction with the rule of man.[75] A society governed by the rule of law should not be subject to the arbitrary whims of government and its officials.

Official resistance, then, flies in the face of this understanding. Resisting officials have a good idea what the law is, and, despite that, choose to act differently. Moreover, official resistance undermines the ideals of certainty and predictability, thus frustrating legitimate expectations. Although resistance is pervasive, suggesting that it is both certain and predictable, the reality is that it will be practiced in a more ad-hoc manner, making it difficult, if not impossible, to predict when and where it will happen. Finally, the very idea of official resistance advances the rule of man rather than the rule of law. Through the act of resistance, officials express their own preferences and expose their own biases—exactly what the rule of law is supposed to guard against.

Official resistance, however, is not only in tension with the rule of law. The rule of law itself contains an inherent and irresolvable ten-

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Opinions, 50 POL. RES. Q. 567 (1997) [hereinafter Spriggs, *Bureaucratic Compliance*] (arguing that agencies comply based on the costs and benefits of alternative ways of responding to court decisions and that, although compliance is the norm, agencies also act in self-interested ways); James F. Spriggs, II, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122 (1996) [hereinafter Spriggs, *A Resource-Based Theory*].

72. JUDITH N. SHKLAR, POLITICAL THOUGHT AND POLITICAL THINKERS 21 (Stanley Hoffman ed., 1998) (presenting a position, though not endorsing it, that " 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use"); *see also* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 137-38 (2002).

73. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 114-26 (2004).

74. *Id.* at 119; *see also* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969).

75. TAMANAHA, *supra* note 73, at 122.

sion with the fact of human agency, which renders official resistance possible. Thomas Hobbes was one of the first political theorists to point to the difficulty of a rule-governed society. As Jean Hampton, summarizing Hobbes's position, writes:

> A rule is inherently powerless; it only takes on life if it is interpreted, applied, and enforced by individuals. That set of human beings that has final say over what the rules are, how they should be applied, and how they should be enforced has ultimate control over what these rules actually *are*. *So human beings control the rules*, and not vice versa.[76]

Hobbes advances two arguments. One is that rules are indeterminate. They require interpretation, and different people will interpret them differently. One solution to this problem is the creation of a judiciary—setting up an institution that is entrusted with saying what the law is. This is Brian Tamanaha's solution.[77] There are numerous problems here,[78] but mostly this solution is not sufficiently sensitive to the second argument derived from Hobbes, which is that rules will not always be able to limit the behavior of officials as a matter of fact. Contrary to the assumption of the rule of law, power cannot be effectively constrained by rules.[79] This is independent from the concern over how rules should be interpreted, since even consensus on a rule's meaning cannot guarantee compliance. Indeed, given the account of official resistance in Part II, the official is engaged in an activity against law, despite her knowing what the law entails. Of course, having a court tell the official what to do might steer the official away from resistance, but that cannot be guaranteed for two reasons. First, the official might disregard what the court ordered her to do.[80] Second, many issues are simply not litigated.[81] Be it for lack of standing, conflicts where the actors do not want to involve the courts,

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76. Jean Hampton, *Democracy and the Rule of Law*, *in* THE RULE OF LAW 13, 16 (Ian Shapiro ed., 1994).

77. TAMANAHA, *supra* note 73, at 123-24. Tamanaha admits that this creates a further problem, which is rule by judges. Thus, he counsels careful selection of judges, though it is not clear how that obviates the concern.

78. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1997) (arguing that the task of adjudication is strategic and ideological and that adjudication serves to entrench the power of the social and economic elites).

79. ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 179-80 (1976) (stating that rules can ensure the impersonality of administrative power only if there were a way to divine their meaning independent of the administrator's preferences, but this is impossible).

80. The chances of her doing that are slim, but not zero. *See* ROBERT J. HUME, 3 HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR 77 (2009). Moreover, officials and institutions may be able to disregard a court decision without openly declaring so. *See infra* Part IV.

81. Indeed, only a fraction of people with claims sue. *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 136 (2002).

or lack of knowledge that resistance is going on, most issues will be settled outside courts, utilizing either intra-organizational or inter-organizational tools, or through politics. It would seem, then, that officials find themselves in the following predicament. On the one hand, they view their task as (primarily) complying with law's demands. On the other hand, they have their own rule conceptions to further and the interpretive capacity (deriving from the indeterminacy of language or from the shortcomings of oversight mechanisms) to do so.

This tension appears every time the official realizes she needs to do something she might not want to do. True, in most cases the sense of duty and the need for job security will override the desire to resist. More importantly, the official's identification with her role and the surrounding institutional ethos will tend to enmesh her in the institutional logic to an extent that she might suspend independent moral thinking, happily doing what her superiors order her to.[82] In other words, the official complies with the law simply because it is the law, independent of any substantive consideration about the merits of the particular policy the law embodies.[83] But recall that officials also have a unique role conception. They do not view themselves merely as automatons but also as instilled with fulfilling some type of public goal, one that may, though not necessarily, come into conflict with the rule of law.[84] Therefore, when official resistance occurs, this means that the law does not operate as a constraint that excludes the consideration of other factors. The success of the regulatory system thus becomes dependent on the officials who administer it. So let us now turn to the institutions where these officials work.

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82. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963). For a powerful formulation of the thesis that evils are often carried out not by evil persons but by people who accept the authority of the state and act based on its orders, see HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (rev. & enlarged ed. 1965). *See also* Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1, 8 (2007).

83. This is what Schauer calls a content-independent reason. *See* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1936-37 (2008) ("[W]e think of authority as content-independent precisely because it is the source and not the content of the directive that produces the reasons for following it.").

84. A possible objection would be that part of the role conception of the public official is to comply with the law. This is true, but this demand will never be an absolutely overriding concern. Another objection would be that the law is the instrument informing the official about her overall role, so taking cues from the law is what an official does. This is true, but, again, only to an extent. Officials will have other sources, derived from institutional culture, personal beliefs, and social mores, which inform their decisions.

B. The Argument from Institutional Design

Even if one accepts the preceding argument about the conflict between the rule of law and human agency, one can still object and ask: Aren't governmental institutions designed with the purpose of making sure that dissent from within does not occur? More specifically, doesn't governmental hierarchy preclude instances of official resistance? After all, don't officials want to keep their jobs? Indeed, one can accept the preceding argument about the inevitable fact of human agency, but add that human agency within government is always constrained, and thus in governmental settings law will either operate as a content-independent reason to perform an action or hierarchical structures will produce compliance. To see why this argument is, at best, incomplete, let us break it in two: the problem of hierarchy and the problem of resistance to change and institutional identity.

1. The Problem of Hierarchy

A central feature of the modern administrative state is its hierarchical structure. Hierarchies ensure that work gets done in an efficient manner and serve as a means to control discretion within a role. Bureaucracies have hierarchical structures because they need to settle internal conflicts that inevitably arise in every large organization and because they require efficient communication inside the organization.[85] The purpose of hierarchy, then, is specialization, coordination, and control. Yet hierarchy is not a safeguard against internal dissent. Governmental structures are not always tightly hierarchical. There can be multiple hierarchies that overlap in confusing and sometimes unpredictable ways which, due to conflicting priorities, create problems of coherence, coordination and control.[86] More importantly, hierarchy alone cannot guarantee compliance. Of course, hierarchy can produce *some* compliance. Robert Michels, for example, famously argued that all forms of bureaucratic organization eventually become oligarchies.[87] In any bureaucracy, there will be leaders, those who are indispensible to the organization and who can best consolidate their interests and rule over others. In exchange for giving officials jobs and promotions, officials will be grateful and will do what the leaders demand.[88] All large-scale societal organizations share a hierarchical rational-bureaucratic structure, and there will always be such organizations because society has an ever-increasing

85. *See* DOWNS, INSIDE BUREAUCRACY, *supra* note 71, at 50-56.

86. JOHN R. SUTTON, LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE 10 (2001) ("[F]ormal roles and hierarchies defined by law are not very useful for understanding everyday legal behavior.").

87. MICHELS, *supra* note 70, at 189.

88. *Id.*

need to administer its complex tasks efficiently. Since there is bureaucracy, some group of people must manage it; thus, power is transferred to them, leading to its monopolization.[89] Once that happens, the powerful group will seek to preserve and entrench their status, even if that runs counter to larger societal interests.[90]

Although this argument has attracted a great deal of criticism,[91] I will argue that hierarchies will never be able to completely eliminate official resistance.[92] Hierarchy implies that an organization will be divided into units and subunits. They are integrated into the hierarchy but at the same time grow to be differentiated from it in terms of the tasks they perform and the resultant subinstitutional identities they develop. This intrainstitutional fragmentation renders resistance possible.[93] As Matthew Smith argued elsewhere, hierarchical structures have limited capacity:

> [H]ierarchical structures can ensure at best only local agreement . . . This is because the "semantic guidance" officials receive . . . will come primarily from immediate superiors. For there to be global agreement, there would have to be a continuous hierarchical chain of such semantic guidance, and such arrangements are highly unstable.
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> . . . [M]ost large-scale legal institutions are composed of a large and heterogeneous group of officials. These officials may not have the same education, political commitments, and level of identification with the institution within which they work. Thus it is likely that there will be a nonnegligible diversity in the beliefs among officials about what it is that they are doing.[94]

Even this account may be overly optimistic. Smith argues that hierarchical structures can ensure, at best, only "local agreement." But

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89. Monopolization occurs because managerial power is centralized up the chain of command, and is thus exercised by a few over the many.

90. *See* Darcy K. Leach, *The Iron Law of* What *Again? Conceptualizing Oligarchy Across Organizational Forms*, 23 SOC. THEORY 312, 313 (2005).

91. *Id*. at 313-14 (citing sources).

92. While alternative institutional structures that emphasize deliberation and participation are possible, those have costs of their own and the tradeoff is not always clear. *See generally* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004). For examples of critiques of such structures, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) and David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008).

93. On the severability of institutions into components, see Richard H. Hall, *Intraorganizational Structural Variation: Application of the Bureaucratic Model*, 7 ADMIN. SCI. Q. 295 (1962).

94. Matthew Noah Smith, *The Law As a Social Practice: Are Shared Activities at the Foundation of Law?*, 12 LEGAL THEORY 265, 287-88 (2006).

why should we assume that even that is possible? Of course local agreement exists, but it cannot be achieved one hundred percent of the time. Local agreement, therefore, is contingent upon rather than intrinsic to the institutional structure itself. In other words, no one ever knows everything about what is going on in the organization.

In this respect, consider the reality of bureaucratic life. Our dominant vision of bureaucracy is influenced by Max Weber,[95] who understood society's main goals to be efficiency, freedom, and fairness.[96] Consequently, the optimal way of societal organization, per Weber, was the separation of lawmaking (politics) from law application (bureaucracy).[97] The bureaucracy, insulated from politics, is best suited to implement the state's policies by being formally rationalized. Formality is the level of insulation of law from external societal factors.[98] Rationality is law's ability to be implemented uniformly, to treat like cases alike.[99] Thus, bureaucracy rests on general rules and procedures, impersonality, hierarchical order, predictability, employs ends-means calculi, and applies equally to all.[100]

And yet, the notion that formal rationality is the defining feature of bureaucracy underemphasizes the organizational problems that give rise to official resistance. Whereas Weber linked hierarchy with compliance, the myriad principal-agent problems in administrative agencies cast doubt on this proposition.[101] Consider that rules have to be given by the top and implemented by subordinates. But language is imprecise and resources will be limited for the top to convey exactly what it wants the official to do. Of course, as is often the case with rules, they will be either overinclusive or underinclusive, or both, which might give the public official sufficient latitude for resistance. Thus, as orders travel through the organization, they will inevitably be distorted.[102] Close supervision may be able to alleviate this problem, but in bureaucracies, "each level of the hierarchy receives a progressively narrower range of information regarding matters within

95. *See, e.g.*, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196-264 (H.H. Gerth & C. Wright Mills eds., 1946).

96. William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1225 (1983).

97. 2 MAX WEBER, ECONOMY AND SOCIETY 653-58 (Guenther Roth & Claus Wittich eds., 1978).

98. *Id.*

99. *Id.*

100. MATHIEU DEFLEM, SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION 43-46 (2008).

101. For an elaboration on these problems, see Simon, *supra* note 96, at 1226-36.

102. For examples of the problems of over and underinclusiveness, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) and Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 992-93 (1995). For a discussion regarding the distortive effect of problems of communication, see DOWNS, INSIDE BUREAUCRACY, *supra* note 71, at 77-78.

the control of its subordinates."[103] Supervision exists, but given time, institutional, and informational constraints, it is rarely at a level which will optimally monitor the behavior of subordinate officials. Consequently, supervising institutions may be severely limited in their ability to control the implementation of their policies. Moreover, even if sufficient information flows to agency heads, there are reasons why they may choose not to act on cases of resistance, either because resistance gets drowned out due to information overload or because leaders would rather not know what is going on in order to avoid penalties.[104] All of this makes officials more sensitive to activities that are more easily reviewable while neglecting their other duties, even if those are more consonant with the agency's overall goals.[105] Finally, officials may be alienated from their work. The routine, the workload, and the constant lack of resources can cause officials to shirk their duties, but also to engage in "ritualistic compliance," which is symbolic but not substantive.[106]

A possible solution to these problems is for managers to organize the incentive structure so as to increase compliance and supervision.[107] Such solutions, however, fail where the official's actions cannot be supervised by the manager or where outputs are difficult to measure, a common situation in bureaucracies. Bureaucrats often face conflicting goals and answer to managers from different institutions, making compliance particularly challenging.

Finally, there is an inherent tension between rules and hierarchy. The rule of law insists that the sovereign's will be expressed as rules. This precludes the sovereign from personally enforcing the rules, so as to prevent ad hoc decisionism and arbitrariness. However, hierarchy requires that enforcers comply with the will of the sovereign, which suggests that the sovereign *should* participate in the enforcement of the rules, especially since communication problems prevent the rules from fully expressing the sovereign's will. These conflicting impulses demonstrate the problem with the notion of legality, which views law as both constraining and extending the power of the sovereign. Bureaucracies purport to limit discretion through hierarchy, but they also purport to limit discretion through rules, thus making

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103. Simon, *supra* note 96, at 1233.

104. *See* HERBERT KAUFMAN, ADMINISTRATIVE FEEDBACK: MONITORING SUBORDINATES' BEHAVIOR 55-58, 65-66 (1973).

105. *See id.*

106. For some implications of worker alienation for public officials, see MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 79-80 (1980).

107. *See, e.g.*, KAUFMAN *supra* note 104, at 72-78 (recommending such changes); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 154-75 (1989).

it possible for bureaucrats to appeal beyond their superiors to the rules, and vice versa.[108]

The case of *Harley v. Schuylkill County* demonstrates this tension.[109] Harley, a prison guard, refused to have a prisoner "stand check" in front of his cell, contrary to an order he received from the warden.[110] Upon examining the prisoner, Harley discovered that he had been beaten, and believed that "dragg[ing] him from his cell . . . to stand check" would infringe on the prisoner's constitutional rights, because force would have to be used.[111] Harley was subsequently fired, only to have a court accept his claims, determining that there is a constitutional right to refuse to violate another's federal constitutional rights.[112]

Here the public official—in this case the prison guard—was under a conflicting set of orders. Under the rule of organizational hierarchy, he had to comply with the warden's instructions. But under substantive law, he believed the order was illegal. Thus, he appealed beyond hierarchy to the rules. Of course, the situation could have been reversed—complying with hierarchy contrary to substantive rules. Resistance then, whether to the order or the Constitution, was inevitable.[113]

Presumably, the remedy to these problems is the idea of the rule of law. But in light of the tension between the rule of law and human agency, the rule of law is itself problematic and, to an extent, anachronistic.[114] While the rule of law is intended to achieve coordination, official action makes that coordination more complicated.[115] As rules become more complex, political controversy and fragmentation increases. As a result, synchronization, legal certainty, and stability decline.[116]

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108. Simon, *supra* note 96, at 1235; *see also* James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, *in* EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 1 (James Mahoney & Kathleen Thelen eds., 2010) (discussing the problem of rules that are applied by actors other than the designers).

109. 476 F. Supp. 191 (E.D. Pa. 1979).

110. *Id.* at 192-93.

111. *Id.* at 193.

112. *Id.* at 193-94.

113. *See also* Robert M. Cover, *The Supreme Court 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 47 (1983) (arguing that the choice to obey the Constitution or a statute inevitably entails an act of obedience to one and disobedience to the other).

114. PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978).

115. William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization?: Critical Reflections on Directly-Deliberative Polyarchy*, 17 CAN. J.L. & JURISPRUDENCE 101, 102 (2004).

116. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); *see also* NONET & SELZNICK, *supra* note 114, at 93-95, 102-03 (arguing that the diffusion of legal authority and the rise of the administrative state bring about a withering away of the state). In such multiplicity of institutions, the idea of public interest loses its meaning; each institution serves a different constituency. *Id.*

2. The Problem of Resistance to Change and Institutional Identity

The previous section discussed the problem of *intra*-institutional resistance in the context of hierarchy. However, institutions are not stand-alone entities. They operate in a complex web of state and federal institutional interactions that is only partly defined by hierarchy. Resistance, then, is also an *inter*-institutional phenomenon. Just as there are internal agency problems with subordinates resisting their superiors, there are conflicts between governmental institutions. If there are problems achieving compliance within a specific institution, it stands to reason that there will be problems achieving compliance in the overall governmental scheme. The problems linked to hierarchy are thus reproduced on an inter-institutional level.

Consider, for example, the problem of supervision. Congress authorizes the establishment of administrative agencies, appropriates funds, sets mandates, and supervises their ongoing work, making sure they meet legislative goals. But with the rising number of administrative agencies, an already busy Congress cannot supervise all agencies all the time. As a result, congresspersons tend to prefer a less centralized model of supervision by relying more on independent actions by citizens and interest groups who alert them to alleged violations.[117] Either model of supervision—centralized or decentralized—cannot achieve complete control. With the centralized model, Congress is bound to miss a significant chunk of agency action, simply because it can only examine a small sample. With the decentralized model, the types of violations that will be detected are those which constituents and interest groups care about, which, again, are far from the entire gamut and are not necessarily coextensive with congressional goals.

Two complementary features of inter-institutional interaction also facilitate resistance: resistance to change and assertion of institutional identity. In every organization, an informal institutional structure develops alongside a formal one. An informal structure is defined as " 'the aggregate of the personal contacts and interactions,' . . . which do not have common or joint purposes and which are, in fact, 'indefinite and rather structureless.' "[118] The informal processes

117. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that congressional oversight is best described not as a centralized policing model, but as a "fire alarm" model that depends on "alerts" by constituents and groups); *see also* Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 693 (1994) (finding evidence that litigants perform a similar fire alarm role in the judicial system).

118. Philip Selznick, *An Approach to a Theory of Bureaucracy*, 8 AM. SOC. REV. 47, 47 (1943); *see also* EUGENE BARDACH, GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP (1998) (examining the use of informal agency

facilitate resistance to change because they modify the way the institution operates, even to the point of changing its goals. Although the informal structure is not consciously produced, it is binding nonetheless. Informal structures can manifest themselves in solidarity and prestige construction but also in protection from outside interference, exhibiting a strong resistance to change.[119] This means that organizations "will be poorly adapted to perform tasks that are not defined as part of that culture."[120] As bureaucratic structures become more professionalized and expert-based, officials get used to and want more independence and the freedom to work without excessive external constraints.[121]

Resistance to change is also a result of institutional inertia. Institutional practices follow a significant investment in time, resources, and efforts, which constitute a "sunk cost" and lead to path dependence.[122] Implementing change means these costs will have to be reincurred. The greater the change, the more likely resistance becomes.[123] Inertia among individuals also plays a role. For example, Dan Reiter suggests that

> Individuals' knowledge structures tend to acquire inertia, such that beliefs tend to persevere through reception of new, discrepant information. Similarly, organizations tend to develop collective interpretations of history, which acquire the status of myth within the organization and can be very resistant to change. For both individuals and organizations, often only a crisis or significant experience can overcome this inertia and form a new belief.[124]

Organizational culture thus accounts for institutional recalcitrance in the face of change. When things have been done a certain way for a long time, changing course is difficult.[125] Moreover, even if it appears that change has taken place, it may be symbolic or cosmetic,

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structures to achieve interagency collaboration). *See generally* HOWARD E. ALDRICH, ORGANIZATIONS AND ENVIRONMENTS (Stanford Univ. Press 2008) (1979).

119. Selznick, *supra* note 118, at 47.

120. WILSON, *supra* note 107, at 95.

121. *Id.* at 153.

122. On path dependence, see James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC'Y 507 (2000) and Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

123. DOWNS, INSIDE BUREAUCRACY, *supra* note 71, at 195-96. For the proposition that administrative inertia makes deviating from a heavily invested course of action less likely, see Barry M. Staw & Jerry Ross, *Behavior in Escalation Situations*: *Antecedents, Prototypes, and Solutions*, 9 RES. ORGANIZATIONAL BEHAV. 39, 48-55 (1987).

124. Dan Reiter, *Learning, Realism, and Alliances: The Weight of the Shadow of the Past*, 46 WORLD POL. 490, 494 (1994).

125. Thus, substantial and comprehensive changes are less likely to be implemented compared with gradual and incremental reforms. *See* Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 259 (2008); Spriggs, *Bureaucratic Compliance*, *supra* note 71, at 572.

with the old policy remaining the real practice.[126] The overarching governmental scheme also affects resistance to change. For example, it matters which institutions are superior to the resistant institution. Each institution has different tools—legal and political—to ensure compliance and each institution exerts different levels of political power so that it is easier to resist weak institutions than strong ones. For example, scholars have pointed out that because courts have few mechanisms to supervise how agencies respond to their decisions, they have limited ability to guarantee compliance, at least when compared with legislatures.[127] But not all courts are made the same. The Supreme Court is considered to have more power (real and symbolic) than lower courts and state courts. Therefore, resistance to the Supreme Court is much lower than to lower federal courts and state courts.[128] Another factor impacting resistance to change is whether the institution is a one-shot player or a repeat player in the courts. Government institutions tend to be repeat players when it comes to their interaction with courts. Resistance might harm future success in court, decreasing the incentives to resist. Here too, not all government agencies are made the same. Some are not repeat players, or are less often repeat players, which should impact resistance accordingly.

The preceding analysis presupposed that resistance to change is an institutional phenomenon. But institutions are comprised of individuals with preferences of their own, which may accompany institutionalized resistance. Put differently, a general institutional resistance to change reflects a personal resistance to change.

In a series of experiments conducted over the past fifteen years, political psychologists have identified a motivation to defend the status quo. Termed "System Justification Theory" (SJT), they argue that people develop rationalizing stereotypes to "bolster the legitimacy of

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126. *See, e.g.*, Barbara Bigelow & Melissa Middleton Stone, *Why Don't They Do What We Want? An Exploration of Organizational Responses to Institutional Pressures in Community Health Centers*, 55 PUB. ADMIN. REV. 183 (1995) (documenting symbolic compliance with governmental demands among nonprofit health centers); William H. Clune III & R.E. Lindquist, *What "Implementation" Isn't: Toward a General Framework for Implementation Research*, 1981 WIS. L. REV. 1044, 1064 (1981) (discussing symbolic cooptation).

127. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008); Baum, *supra* note 5. An exception to this is the spurt of institutional reform litigation during the second half of the 20th century, where courts closely monitored agency compliance with their decisions. Yet this litigation has become rarer, mainly due to issues of institutional competence and legitimacy. *See, e.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007); Susan Poser, *What's a Judge to Do? Remedying the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307 (2004) (reviewing ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003)).

128. Spriggs, *Bureaucratic Compliance, supra* note 71, at 582 (finding that between 1953 and 1990, no federal agency defied or evaded a Supreme Court ruling).

the prevailing system when it is threatened or attacked."[129] People develop adaptive mechanisms to "accommodate, internalize, and even rationalize, key features of their socially constructed environments, especially those features that are difficult or impossible to change."[130] SJT claims that the people who tend to be the most socio-economically disadvantaged are the least likely to engage in social reform because of their tendency to legitimize the system and its overall social arrangements.[131] Disadvantaged members have a need to reduce the dissonance associated with their low social position by justifying their suffering and their participation in the system that results in their social position.[132] By extension, we may think of classes of workers in governmental hierarchies. Those at the bottom who resent their position and yet seek to justify their institutional location, versus those at the top who push for change.[133]

This joins a more general point about uncertainty. People who have a high need to manage uncertainty are more likely to be conservative and adopt system-justifying ideologies. Since status quo arrangements are familiar and certain, justifying the status quo satisfies the need for consistency and certainty.[134] Similarly, uncertainty regarding the distribution of gains and losses from reform may result in resistance to change and status quo bias.[135]

The upshot of resistance to change is the development of an institutional identity or ideology. In organizational literature it is common to think of two sources of organizational commitment—instrumental commitment and affective commitment. Instrumental commitment describes the way compliance is achieved through a method of exchanges. The employee contributes her labor in exchange for inducements provided by the organization. Affective commitment occurs when employees develop an attachment to the organization, driven by values and ideologies, which can be actualized through participation in

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129. *See* John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 890 (2004).

130. *Id.* at 912 (emphasis omitted).

131. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1131 (2006).

132. *Id.*

133. This can cut both ways, in the sense that if people rationalize their position they will also be less likely to resist. Thus, this argument will probably apply when an institution is threatened from the outside.

134. Blasi & Jost, *supra* note 131, at 1138.

135. *See* Raquel Fernandez & Dani Rodrik, *Resistance to Reform: Status Quo Bias in the Presence of Individual-Specific Uncertainty*, 5 AM. ECON. REV. 1146 (1991) (predicting that if gainers and losers cannot be identified ex ante, it would be difficult to garner political support for the reform). Notably, this argument does not rely on another cause for resistance, that of sunk costs in existing practice, but rather on the uncertainty resulting from the reform. *Id.*

the organization.[136] Employees who identify with their organization in turn contribute more, thus enhancing, and entrenching, the particular values and ideologies the organization stands for. Furthermore, organizations tend to draw people who are already predisposed to the institution's goals and commitment. Thus, they not only adopt the organization's values, but they also strengthen it with their own personal network of similar values.

In any organization, people develop and maintain a sense of identity, which is shaped by the group to which they belong and toward which they maintain a positive attitude, in the belief that the group values and respects them.[137] Pride in a group leads to deference to its social rules, because people gain from deferring to group authority when their self-conception is tied up with the success of the group.[138] But from this follow potential risks. Namely, identification with the organization's ideology makes organizational change less likely. Support for the current order means support for the norms and underlying values, thus increasing the likelihood of resistance to change.

Once particular practices become entrenched, pride and attachment have coalesced to resist outside scrutiny and intervention.[139] Outside intrusion in the form of an adverse court decision or a new regulatory policy might meet resistance because it conflicts with the institution's identity, ideology, its sense of purpose, and its view of its own expertise in the field vis-à-vis other governmental institutions.

The behavior of the Environmental Protection Agency (EPA) during the Reagan Administration demonstrates these points.[140] President Reagan and his administration were hostile to EPA regulation efforts, essentially working to reduce the effort to stop pollution.[141] At first, the Administration reorganized the EPA, fired personnel and appointed people responsive to the new presidential policy.[142] In 1982, with the passing of a new budget, the operating budget was cut by

136. *See* Larry E. Penley & Sam Gould, *Etzioni's Model of Organizational Involvement: A Perspective for Understanding Commitment to Organizations*, 9 J. ORG. BEHAV. 43, 44 (1988).

137. Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, *in* THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 416, 421 (John T. Jost & Brenda Major eds., 2001).

138. *Id.* at 424-25 (explaining how the official's identity is constructed by the organization where she works to the point of nonseverability between the official and the organization for the purposes of finding liability).

139. *See* Oliver James & Christopher Hood, *Prisons: Varying Oversight and Mutuality, Much Tinkering, Limited Control*, *in* CONTROLLING MODERN GOVERNMENT: VARIETY, COMMONALITY, AND CHANGE 25, 30 (Christopher Hood et al. eds., 2004) ("[A]t the level of prison staff, as with other uniformed state services, mutuality has often taken the form of a 'canteen culture' embracing one-for-all solidarity against outside scrutiny or criticism.").

140. *See generally* B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213 (1988).

141. *Id.* at 217.

142. *Id.*

24% and expenditures for air pollution monitoring declined by over 42%, alongside a cut of 31% in clean air personnel.[143]

Given a hostile administration and the most Republican Congress since the 1950s, one would expect EPA activity to go down considerably.[144] That happened, but only to an extent. In the year following Reagan's inauguration, and before the passage of the 1982 budget, the EPA resisted the Administration by increasing environmental enforcement activity.[145] In 1982, with slashed budgets and resources, enforcement activity did decline by about 23%.[146] It was then that EPA officials started leaking information to the press, resulting in Congress calling EPA officials to testify more than seventy times about nonimplementation of the Clean Air Act between October 1981 and July 1982.[147] Eventually, this led to the resignation of Reagan-appointed EPA Administrator Anne Gorsuch in 1983.[148] After the resignation, and thanks to committed bureaucrats who stayed on from the Carter administration, there was a considerable jump in enforcement activity (50%), which even surpassed that of the previous Carter Administration.[149] Facing a drastically reduced budget, the EPA diverted efforts to non-resource-intensive enforcement activity, moving from monitoring (detecting violations) to abatement activities (issuing notices and decrees).[150] In this way the EPA adapted to the changed environment in which it was operating by seeking to either boost or maintain regulatory activity.

In conclusion, resistance to change that stems from a strong institutional identity casts doubt on the robustness of democratic hierarchical models, according to which a top elected official, such as the president (principal), can direct the bureaucracy (agent) to do what he wishes. The EPA (more or less) successfully maintained its policy preferences despite a hostile President. Hierarchy, then, is only partially effective at inducing compliance and cabining resistance.

IV. STRATEGIES OF OFFICIAL RESISTANCE

Part III identified two factors, which, though not exhaustive, explain resistance on both the individual level (conflict between the rule of law and human agency) and the institutional level (instability of hierarchy, resistance to change, and institutional identity). Resistance

143. *Id.* at 218.
144. *See id.*
145. *Id.* at 222-24.
146. *Id.* at 224.
147. *Id.* at 218-19.
148. *Id.* at 219.
149. *Id.* at 224.
150. *Id.* at 224-26.

exists partly because the very mechanisms that are instituted to induce compliance are structurally susceptible to resistance. If official resistance is possible, and indeed inevitable, how is it instantiated? This is the focus of the present Part. Although there are many strategies public officials deploy when they choose to resist the law, I will focus on those I believe to be the most salient.

The costs of full-blown, out in the open, disobedience can be high. Officials and institutions that openly defy the law will usually expect severe legal and political sanctions. Thus, we can expect official resistance to take more covert forms.[151] In the following pages, I provide a typology of resistant official behavior. Of course, the choice of strategy will vary depending on the particular circumstances of each scenario, the reason for resistance, the extant political climate, the anticipated institutional reaction, and the particular tools officials possess in their toolkit. Thus, the typology does not suggest a linkage between strategy and situation. Since the range of situations is enormous, I believe it is preferable to highlight the types of strategies, acknowledging that they can apply in a wide variety of contexts. Finally, many of the strategies below are not exclusive to official resistance. Similar behavior that lacks a subjective motivation to resist will not be considered resistance, even if it appears to the outside observer as the same.

A. Defiance

The most blatant form of resistance is outright defiance. For the sake of simplicity, let us assume that a particular policy or rule has been declared unconstitutional or impermissible. Instead of changing course, the resisting official or institution decides to reject the verdict and continue as before. Despite the potentially high political costs associated with this behavior, defiance is not as uncommon as one might think. The aforementioned case of the Kentucky land laws is one example,[152] but there are many others. Southern resistance to desegregation after *Brown v. Board of Education* is perhaps the most well-known.[153]

After *Brown*, officials throughout the South sought ways to defy the decision. Some, such as Arkansas Governor Orval Faubus spoke out against desegregation, vowing to maintain segregated institutions. The forgotten doctrine of interposition, according to which states have the right to protect themselves from federal intervention,

151. JENS LEHNE, CONSTITUTIONAL COMPLIANCE: A GAME-THEORETIC ANALYSIS 265 (2004).

152. *See supra* text accompanying notes 59-69.

153. The extant literature on this is extensive. For an overview and discussion of Southern official resistance, see BARTLEY, *supra* note 10.

was revived.[154] The Arkansas State Legislature amended the state constitution to oppose desegregation and passed a law that relieved children from mandatory attendance at desegregated schools.[155] Other states followed suit, issuing statements of interposition, asserting the compact theory of the Union and vowing to maintain control over education as a matter of states' rights. Four states—Alabama, Florida, Mississippi, and Georgia—went even further and nullified the Court's ruling.[156] Municipalities and state legislatures enacted laws that sought to keep schools and other places segregated. Louisiana, for example, passed a constitutional amendment withdrawing its consent from suits involving state and local school officials.[157] This was relatively easy and not particularly costly to do, whereas it was very costly for groups like the NAACP to fight every new law with litigation.[158] This is why official resistance partly succeeded, at least until the passage of the 1964 Civil Rights Act, which empowered the Attorney General to file suit against resisting schools and allowed defunding any program or activity receiving federal funds that discriminated based on race, color or national origin.[159] States, municipalities, and institutions were then forced to comply, but attempts to defy *Brown* persisted for decades after the decision.[160]

While this is not the place to analyze all the techniques deployed by Southern officials in their attempts to resist *Brown*, it is important to consider one explanation, which has an implication for official resistance. Resistance to *Brown* was not only fueled by rabid segregationists. Of course, much of popular resistance to *Brown* in the South was based on racial prejudice. But when it came to public officials, the story was more complicated. Governor Faubus, for example, was not a white supremacist. His stance on desegregation prior to 1957 was relatively moderate compared with the more radical pro-segregation elements in Arkansas politics. Although in the beginning he sought to avoid confrontation with federal authorities, Faubus was also a politician who wanted reelection and was pres-

154. *Id.* at 126-49. The doctrine of interposition dates back to the Kentucky and Virginia Resolutions of 1798 refusing to comply with the Alien and Sedition Acts. Under the doctrine, states have a right to "interpose" their sovereignty and come between the federal government and their people, thus thwarting federal will.

155. Cooper v. Aaron, 358 U.S. 1, 9 (1958).

156. BARTLEY, *supra* note 10, at 131-32 (discussing interposition resolutions in various southern states).

157. *Id.* at 135.

158. ANDERSON, *supra* note 10, at 232 (arguing that states could exploit the state treasury, whereas blacks only had costly litigation at their disposal).

159. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C §§ 2000d to 2000d-7 (2012).

160. *See infra*, Part IV.D (discussing outsourcing).

sured by political opponents,[161] which explains the turn he made closer to the 1957 Little Rock confrontation with the National Guard. Faubus' white constituency was, by and large, pro-segregation. Although Arkansas and other southern states were relative outliers nationwide, segregation was popular in the South.[162] The national minorities were thus local majorities. Defiance, then, was partly fueled by Southern officials caring more about the expected sanctions from their constituency than sanctions imposed by the federal government. Bolstered by the local public, Southern officials could defy *Brown* at a relatively low cost, and in fact, for some, it made their political careers. By openly defying the Supreme Court and calling for preserving segregation, Southern politicians were voted into political offices to replace more moderate opponents.[163] Of course, when federal troops were called in to Little Rock, and especially after federal funding was put in jeopardy, the balance changed and officials were forced to rethink their position.[164]

Despite the salience of these events and their predominance in the collective memory (and the literature), there is nothing particularly unusual about officials catering to their own constituency, even at the cost of openly defying superior institutions. San Francisco's decision to issue marriage permits for gay and lesbian couples cannot be divorced from the high rate of gays and lesbians and those favorable to their cause living in San Francisco. Similarly, numerous municipalities presumably catered to liberal constituencies when passing ordinances prohibiting city workers from cooperating with or assisting investigators trying to carry out provisions of the Patriot Act.[165] This type of local activism, reflecting local preferences over federal

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161. Accordingly, Faubus' rejection of desegregation was based on his fear that violence would erupt, a claim unsupported by the evidence. *See* David Wallace, *Orval Faubus: The Central Figure at Little Rock Central High School*, 39 ARK. HIST. Q. 314 (1980). *See generally* ROY REED, FAUBUS: THE LIFE AND TIMES OF AN AMERICAN PRODIGAL (1997).

162. *See, e.g.*, BARTLEY, *supra* note 10, at 13 (citing statistics, according to which 64% of Southerners supported "strict segregation" while only 7% supported integration).

163. *See, e.g.*, Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82, 97-110 (1994).

164. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

165. Lori Riverstone-Newell, *The Impact of Symbolic Action: Local Government Refusal to Comply with State and Federal Laws*, Paper Presented at the American Political Science Association Annual Meeting, September 3-6, 2009 (unpublished paper) (on file with author) (stating that by 2009, some 407 municipalities passed resolutions that promised resistance if called upon to enforce the Act locally); Ernest A. Young, *Welcome to the Dark Side*: *Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1282 (2004).

and state laws, and resistance to "outside" intervention, can be found in diverse areas such as gun control, healthcare, and immigration.[166]

B. Nonacquiescence

A milder form of defiance, one which is primarily associated with agency-court interaction, is a strategy which has come to be known as agency nonacquiescence. This occurs when "an agency applies a court decision only to the parties who participated in the original litigation, refusing to treat the case as binding precedent in subsequent proceedings."[167] The literature distinguishes between intercircuit nonacquiescence and intracircuit nonacquiescence. Intercircuit nonacquiescence, which is more common and less problematic, occurs when an agency refuses to follow the decisions of a circuit court which does not review its decisions. Absent a definitive statement by Congress or the Supreme Court, the agency uses its discretion to decide whether to apply an outside circuit court's ruling in its jurisdiction. This practice is fairly routine and has evinced little legal opposition. Sometimes it is used to provoke a circuit split. Sometimes the behavior is considered favorable, since it allows cases to percolate before making their way up the hierarchical chain of courts. But often the agency believes that a different court's decision impinges on its role as the expert policymaker.[168]

A different and more controversial case is intracircuit nonacquiescence.[169] Here, the agency refuses to apply precedents to other cases arising in the same jurisdiction. In effect, the agency is telling the court that it refuses to acknowledge its power to set precedent in its own jurisdiction and insists on re-litigating similar cases before the circuit court or district courts in the same circuit. For example, during the Reagan administration, the Social Security Administration (SSA) reviewed the status of the disabled and indigent receiving social security benefits. The review ended up terminating the benefits

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166. Young, *supra* note 165, at 1282; *see, e.g.,* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006).

167. HUME, *supra* note 80, at 92.

168. *Id.* at 95. On the merits of jurisdictional multiplicity, see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

169. The following discussion draws on Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339 (1991); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664 (1993).

of over 200,000 beneficiaries.[170] Many sued, and various courts (district and circuit) consistently held that the legal process resulting in the denial of benefits was inadequate. Still, the process continued uninterrupted (except for restoring the benefits of the particular people who sued), while the Secretary for Health and Human Services explicitly directed agency personnel to follow agency standards instead of the courts'.[171] In *Finnegan v. Matthews*[172] and *Patti v. Schweiker*,[173] the Ninth Circuit effectively expanded the number of disability beneficiaries in the federal Supplemental Security Income program. The SSA resisted, and in a pair of policy statements explained that "The Social Security Administration (SSA) does not acquiesce in the court's decision."[174] It further wrote that the "SSA believes that the court's standard . . . would be impossible to administer and that the correct standard is [its own regulation] . . . SSA believes that this regulation is fully consistent with . . . Congressional intent."[175]

The practice of agency nonacquiescence has, by and large, been criticized by courts and scholars alike.[176] Courts declared the practice a breakdown of the rule of law,[177] a perversion of justice,[178] and threatened contempt.[179] Nonacquiescence became so severe and widespread that Congress sought to intervene. During the consideration of the Social Security Disability Benefits Reform Act of 1984, the House version of the bill prohibited agency nonacquiescence in its entirety.[180] The Senate version of the bill, though not barring nonacquiescence, mandated certain procedural safeguards when it was invoked.[181] None of this mattered, however, because both of these provisions in the bills were ultimately deleted in conference.[182] However, as Estreicher and Revesz note, this was not a sanctioning of nonacquiescence. The conference report insisted that nonacquiescence is legitimate only when the agency has initiated steps to appeal to the

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[170] William Wade Buzbee, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 582 (1985).

171. *Id.*

172. 641 F.2d 1340 (9th Cir. 1981).

173. 669 F.2d 582 (9th Cir. 1982).

174. HUME, *supra* note 80, at 97.

175. *Id.*

176. *But see* Estreicher & Revesz, *supra* note 169, at 718-35 (arguing that nonacquiescence is constitutional if the agency wants to achieve a uniform policy); *see also* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987) (arguing more generally that constitutional litigation should only be binding on the litigating parties).

177. Ithaca Coll. v. NLRB, 623 F.2d 224, 228-29 (2d Cir. 1980).

178. Lopez v. Heckler, 725 F.2d 1489, 1503 (9th Cir. 1984).

179. HUME, *supra* note 80, at 93.

180. H.R. 3755, 98th Cong. (2d Sess. 1984).

181. Estreicher & Revesz, *supra* note 169, at 704.

182. *Id.*

Supreme Court and recommended that the Secretary propose remedial legislation to deal with the problem.[183]

Agency nonacquiescence was not confined to the SSA. It posed a general problem in the interaction of courts and administrative agencies.[184] Recognizing this, Congress sought in 1997 to enact legislation to address the problem. This led to House Bill 1544, titled the "Federal Agency Compliance Act," which stipulated, among other things, that

> [An agency] shall, in administering a statute, rule, regulation, program, or policy within a judicial circuit, adhere to the existing precedent respecting the interpretation and application of such statute, rule, regulation, program, or policy, as established by the decisions of the United States court of appeals for that circuit. All officers and employees of an agency, including administrative law judges, shall adhere to such precedent.[185]

The Bill passed the House, was referred to the Senate Committee on the Judiciary, but never passed because the session of the 105th Congress ended. It was reintroduced in the subsequent session, but never put to a vote.[186]

Given the preceding discussion on the causes of official resistance, the institutional motivation to resist in these cases was understandable. The agencies resisted intervention by external institutions. It was important for them to effectuate what they perceived to be the best policy, formulated by their experts. Moreover, the costs of going back to court again and again using public funds, knowing that plaintiffs—especially poor SSA beneficiaries—would lack incentives to pursue expensive litigation, coupled with a supportive executive administration, made resistance attractive. Thus, agencies treated judicial opinions as political obstacles rather than binding directives to be overcome by tactical means: nonacquiescence, more litigation, different judges, and lobbying Congress to override judicial decisions. In a political structure where very few issues are actually decided by the Supreme Court, agencies (and the executive more generally) can bide a lot of time by resisting, hoping to eventually get their way.[187]

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183. Estreicher & Revesz, *supra* note 169, at 703-04.

184. *See Federal Agency Compliance Act: Hearing on H.R. 1544 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Dan T. Coenen, J. Alton Hosch Professor, University of Georgia School of Law). The Federal Agency Compliance Act intended "to prevent Federal agencies from pursuing policies of unjustifiable nonacquiescence in, and relitigation of, precedents established in the Federal judicial circuits." *Id.*

185. H.R. 1544, 105th Cong. (1997).

186. Federal Agency Compliance Act, H.R. 1924, 106th Cong. (1999).

187. KAGAN, *supra* note 116, at 171-72; *see also* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738 (1992) ("[F]ailure to comply with, if not outright defiance of, judicial remedial orders is tolerated to a certain degree.").

Moreover, the reluctance of current doctrine to hold particular officials rather than their organizations in contempt makes public officials further insulated from personally dealing with the consequences of their actions.[188] Thus, the political structure renders official resistance possible, even worthwhile. True, Congress eventually sought to address the phenomenon of agency nonacquiescence, but that was only in 1997, many years after its peak. And again, even that effort failed, whereas the policy that the SSA wanted to effectuate was realized.

C. Bulletproofing

Bulletproofing occurs when an institution attempts to immunize itself from judicial review. It can be achieved by setting up symbolic structures or by reenacting old policy. Essentially, the institution goes through the motions of behaving as a court would like it to behave, without having that behavior affect the outcome of the administrative process.[189] Here, I use the term in a more expansive sense, referring to behavior by any institution or official in response to any superior legal order (not just from a court), which is meant to give the impression that that institution or official complies with the order, but in effect allows the institution or official to promote their own agenda.

This strategy is different from defiance and nonacquiescence, because on the surface there is compliance. It is only when probing deeper that one sees resistance, which means the cost of detection will be higher than in more overt cases.[190] Presumably, then, this is one of the strategy's benefits. If more resources are needed to expose this strategy, parties will be less inclined or capable of pursuing action. From the viewpoint of the official or institution, compliance must be demonstrated in order to maintain legitimacy, which in turn minimizes law's encroachment on their power.[191] For example, in her study of the implementation of equal employment and affirmative action policies mandated by federal statutes, Lauren Edelman has found that "organizations are clearly more likely to create symbolic structures [such as affirmative action officers] that require fewer organizational resources and can more easily be decoupled from actual

188. *See* Spallone v. United States, 493 U.S. 265, 275-80 (1990) (holding that city council members should be held in contempt for refusing to implement a consent decree only after contempt proceedings against the city proved unsuccessful).

189. SIMON HALLIDAY, JUDICIAL REVIEW AND COMPLIANCE WITH ADMINISTRATIVE LAW 63-64 (2004).

190. In some cases we might want to say that there is compliance with the letter of the law but not with its spirit, or that the official complies with a plausible reading of the law while knowing that her interpretation is likely to be invalidated in a future court decision.

191. Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1435-37 (1990).

practices,"[192] so that substantive results which alleviate discrimination are not guaranteed. This happens because organizations want to create a visible commitment to law in order to maintain their legitimacy in the eyes of the public and other institutions, and a formal structure will always be more visible than the extant informal organizational structure. The symbolic structure, then, is a gesture to public opinion, social norms and the law. It operates as a shield against liability and regulatory monitoring.[193]

Setting up symbolic structures is one way to bulletproof resistant behavior. Another strategy is to reenact an old policy after it was declared impermissible, but in a way that will continue to secure the impermissible objectives. This happened, for example, in the Kentucky land cases.[194] It also occurred on a widespread level with myriad voter qualification laws intended to bypass the Fifteenth Amendment's prohibition on race and color as a qualification for voting. Faced with a constitutional prohibition on racial discrimination in the context of voting, many states, especially in the South, instituted literacy tests, that, although were facially neutral, were administered unequally by white officials, permitting illiterate whites to vote and denying literate blacks the right to vote. It was only in 1965, after the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, that black disenfranchisement at the polls was dramatically curtailed.[195]

Reenactments in the face of declarations of illegality were also popular in the aftermath of *Brown v. Board of Education*.[196] Consider, for example, the case of *Green v. County School Board of New Kent County*.[197] In a companion case to *Brown*, the statutory mandated segregation system in Virginia schools was held to be unconstitutional.[198] Despite the ruling, Virginia resisted, enacting statutes authoriz-

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192. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1554 (1992) (arguing that lack of sensitivity to the legal environment fosters a symbolic appearance of compliance without altering the underlying structure). This is especially noticeable when the legal requirements are ambiguous and the enforcement mechanisms are weak. Others have argued that when norms are formulated as rules and not as standards, compliance will be more forthcoming and more resilient to social norms that encourage noncompliance. *See* Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule v. Standard Dilemma*, 4 REV. L. & ECON. 81 (2008).

193. Edelman, *supra* note 192, at 1542.

194. *See supra* Part II.B.2.

195. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000) (describing attempts by states to effectively deny voting rights for blacks between the late 19th century and mid 20th century).

196. 347 U.S. 483 (1954).

197. 391 U.S. 430 (1968).

198. *Brown*, 347 U.S. at 483.

ing segregation, some of which were later struck down.[199] One of these statutes, the Pupil Placement Act, divested local school boards of the authority to place students, transferring that authority to the State Pupil Placement Board, which automatically assigned each student to the school she attended in the previous year, with few exceptions for first time enrollees.[200] To be sure, this was a mildly disguised way of maintaining segregation, but following a legal challenge the school board switched to a "freedom of choice" plan in order to remain eligible for federal aid.[201] The plan consisted of letting the students choose whether they want to go to the "white school" or the "negro school." Those who failed to choose were assigned the school they attended the previous year.[202] No whites chose to go to the black school, and very few blacks chose to go to the white school, keeping the institutions segregated.[203] In its ruling, the Court held that the freedom of choice plan was inconsistent with the *Brown* decisions by failing to transition to a "unitary, nonracial system" of public education.[204]

It is worthwhile noting that in this and similar cases, bulletproofing relies on a background norm in U.S. constitutional law: a violation of Equal Protection must have the government intentionally discriminating.[205] Resistance strategies are thus available because intent is deduced from the circumstances. Under an alternative rule, in which unconstitutional discrimination is established based on disparate impact, regardless of intent, successful resistance would have been more difficult. Put differently, the constitutional norm facilitates resistance.

Reenacting an illegal policy also causes delay. Sometimes, the delay itself can meet the resisters' objectives. First, it takes time to discover the new policy and its effects. Then, fighting the policy, whether through lobbying, legal action, or a public campaign, will be costly and time consuming. Meanwhile, constituents' preferences might change, different judges will sit on the bench, or different politicians will be voting in the legislature. And by the time everything is said and done, and even if resistance fails, it is possible that the resisters would have gotten what they set out to do, or at least be able to claim a partial victory. In the voting context, for example, even

199. *Green*, 391 U.S. at 433 n.1.
200. *Id.* at 433-34.
201. *Id.* at 433.
202. *Id.* at 434.
203. *Id.* at 433.
204. *Id.* at 441; *see also* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 818 (2011) (discussing how "freedom of choice" plans were used by whites to bypass court-ordered racial desegregation).
205. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

though literacy tests eventually disappeared, generations of blacks and other minorities were still denied their right to vote.

D. Outsourcing

Resistance by public officials can be risky. It attracts public criticism and can result in severe opprobrium. One way to avoid harmful consequences is to outsource the resistance. If the official or institution can achieve a separation between the state and the organ that is resisting, then resistance can go on uninterrupted while avoiding the possible harmful costs of resistance.[206] For example, if a state wants to engage in forbidden discrimination, it might outsource that activity to a private agency immune from judicial review due to the state action doctrine. During the desegregation battles, for example, there was a plan to lease Central High School to a private school so that the state would not be forced to integrate.[207] Since private schools are not subject to constitutional judicial review, segregation would have continued, thus frustrating *Brown* and its progeny.

Outsourcing is perhaps most familiar from the school desegregation context, but it has been used elsewhere. For example, the Harris County Courthouse cafeteria in Texas attempted to lease the facilities to a private agency that would bar blacks from being served; the Fifth Circuit enjoined it from doing so.[208] Similarly, the Fourth Circuit held that leasing a state park to a private entity that would have maintained a segregated park was impermissible.[209]

The best example, however, was the use of "white primaries" to deny blacks the ability to participate in party primaries. In the "white primary cases," the Supreme Court confronted outsourced resistance, eventually overcoming it only in *Smith v. Allwright*.[210] In the first case, *Nixon v. Herndon*,[211] the Court invalidated a Texas statute barring black participation in party primaries.[212] The Court had no problem finding state action, because the discrimination was

206. Of course, sometimes the official would like to take credit for resisting a superior decision. In these cases outsourcing will be less appealing because political capital is at stake.

207. ANDERSON, *supra* note 10, at 154, 159 (describing Faubus' plan to send white students to private schools using public funds). Throughout the South there were "white academies"—private schools immune from judicial review that admitted only whites as a way to circumvent *Brown*. In Virginia's Prince Edward County, when courts ordered the admission of black students, the county simply refused to appropriate money for the operation of public schools. This practice lasted from 1959 to 1964. Murphy, *supra* note 65, at 1029 n.57.

208. Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956).

209. Dep't of Conservation & Dev. v. Tate, 231 F.2d 615 (4th Cir. 1956).

210. 321 U.S. 649 (1944).

211. 273 U.S. 536 (1927).

212. *Id.* at 540.

anchored in a statute.[213] But Texas was an outlier, as the only state that had such a law on the books.[214]

The Texas legislature quickly enacted a statute devolving authority to the executive committee of political parties to set the qualifications of their primary elections, which promptly passed a resolution prohibiting the participation of blacks.[215] The statute was challenged and struck down.[216] The Court was able to find state action, reasoning that the statute gave the executive committee the authority to exclude potential members, an authority it lacked prior to the enactment.[217] Shortly after *Condon*, the Texas State Democratic Party passed a resolution barring blacks from membership.[218] Now the severing between the state and the party was complete. The Party decided to bar blacks on its own accord, without an enabling statute. Subsequently, *Grovey v. Townsend* addressed the question whether there is state action when a political party decides to bar blacks from membership. *Grovey* found no state action, allowing political parties to bar blacks from being members.[219] It was only nine years later, in *Smith v. Allright*, that the Court reversed *Grovey*, noting that Texas regulated the Democratic primaries in a myriad of ways, enabling the Court to locate sufficient state action to prohibit the barring of blacks.[220] This, however, was not the end. In response to *Smith*, the South Carolina legislature, for example, increased its outsourced resistance by repealing all the statutes regulating political parties, letting the parties discriminate.[221] The task of addressing further resistance was taken up by lower court judges, who applied and extended *Smith*.[222]

As in previous strategies, we can see that even if resistance eventually fails, a significant period of time may elapse in the meantime. In the white primary cases, litigation continued for nearly twenty years until *Allwright*. During that time, a generation of blacks in the South was effectively denied the right to participate in elections.

213. *Id.* at 541.

214. *See* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 58 (2001) (discussing the Court's power to suppress outliers).

215. Nixon v. Condon, 286 U.S. 73, 81 (1932).

216. *Id.* at 89.

217. *Id.* at 82.

218. Grovey v. Townsend, 295 U.S. 45, 47 (1935).

219. *Id.* at 55. It might be argued that since the rule was upheld in *Grovey* then this was not a case of official resistance. Yet I think that misses the point. Despite the favorable ruling in *Grovey*, it seems clear to me that throughout the series of cases Texas sought ways to avoid granting blacks the vote, which it most likely understood as being out of step with the Fourteenth and Fifteenth Amendments.

220. Smith v. Allwright, 321 U.S. 649, 665-66 (1944).

221. Klarman, *supra* note 214, at 94.

222. *Id.* at 95.

Even after *Smith*, many officials refused to comply with the ruling, and blacks, especially in the rural South, feared physical violence, among other things, should they attempt to register.[223]

A recent case highlights the modern uses of outsourcing. In 1934, members of the Veterans of Foreign Wars placed a cross on federal land in the Mojave National Preserve in California, honoring fallen soldiers from World War One.[224] The cross stood there, undisturbed, until 2002, when a federal district court issued an injunction to have it removed, reasoning that having a cross on federal land violates the Establishment Clause by giving the reasonable observer the impression that the government endorses Christianity.[225] After the decision became final, Congress showed its displeasure with the ruling by enacting a land transfer statute, giving the land to the Veterans of Wars in exchange for another parcel of land in the Preserve.[226] The bill also stipulated that the property would revert to the Government if not maintained "as a memorial commemorating United States participation in World War I and honoring the American veterans of that war."[227]

The case then returned to the district court based on a challenge to the land transfer. Striking down the statute, the court held that it was an invalid attempt to keep the cross, contrary to the Constitution and the first court decision.[228] However, in the Supreme Court that decision was reversed and the statute upheld.[229] In an opinion by Justice Kennedy, the Court reasoned that the government's purpose was not to set its imprimatur on Christianity, or to evade the lower courts' decisions, but to respect fallen soldiers and to maintain the symbolism of the monument.[230] The Court held that these new circumstances required that the bill be upheld and the injunction invalidated.[231]

Unlike the white primary cases or the desegregation cases, this time the outsourcing worked. By passing the bill, the government

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223. *Id.* at 96-100.

224. Buono v. Norton, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002), *aff'd*, Buono v. Norton, 371 F.3d 543 (9th Cir. 2004).

225. *Id.* at 1217.

226. Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1098, 1100 (2003). This was not the first statute addressing the problem. In the beginning, Congress passed a bill prohibiting the use of government funds to remove the cross. A second bill was then passed, identifying the cross as a "national memorial." A third bill, enacted after the district court's decision, repeated the prohibition on using government funds to remove the cross. *See* Salazar v. Buono, 130 S. Ct. 1803 (2010).

227. Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(e), 117 Stat. 1098, 1100 (2003).

228. Buono v. Norton, 364 F. Supp. 2d 1175 (C.D. Cal. 2005), *aff'd*, Buono v. Kempthorne, 502 F.3d 1069 (9th Cir. 2007).

229. *Salazar*, 130 S. Ct. at 1821.

230. *Id.* at 1808.

231. *Id.* at 1820.

severed its connection with the land. With the land losing its federal status, it was also less susceptible to judicial review, or so the bill's framers intended. Although the Court ended up approving the measure, in the days and months leading up to the ruling very few people were fooled by what the government was trying to do. The New York Times, for example, called the land transfer "mere window-dressing."[232] Others have identified Congress's move as an attempt to evade the Establishment Clause.[233] Outsourcing, then, is a strategy which attempts to disassociate the government from the problematic action, but with the intent (or at least the understanding) that the action will continue.

E. Prioritization

Defiance, nonacquiescence and outsourcing are overt measures to signal official resistance. Often, however, none of these strategies will be needed. In the modern administrative state, agencies and institutions are charged with a variety of tasks with limited resources to accomplish them. There is thus a constant "gap between tasks and resources," forcing the institution or official to choose which rule to invoke, which behavior to target, and which activity to focus on.[234] This is otherwise known as prioritization. Faced with the inability to accomplish all its objectives simultaneously, an institution must decide which should be pursued, to what extent, and when. Consider, for example, a typical police officer walking her beat in a busy city. In the course of her day, she sees a variety of criminal acts, from traffic violations, public misconduct, and perhaps even a drug deal or two. Even if the officer wants to go after each perpetrator, her resources are limited. She must choose by prioritizing—by using her discretion in invoking the criminal process.[235] Allowing the police to prioritize without formally acknowledging so in criminal codes serves identifiable social goals. It maintains the impression of the rule of law, preserves the universalistic symbolism of the criminal law, and avoids the acknowledgement that the law is not meant to be taken literally.[236]

Although prioritization can be described in the neutral terms of task management and limited resources, it can also be a vehicle of resistance. Consider, for example, an attorney general who states

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232. Editorial, *The Constitution and the Cross*, N.Y. TIMES, Oct. 7, 2009, at A28.

233. David C. Peet, *Deed of Mistrust?: The Use of Land Transfers to Evade the Establishment Clause*, 59 AM. U. L. REV. 129 (2009).

234. NONET & SELZNICK, *supra* note 114, at 36-37; LIPSKY, *supra* note 106, at 14.

235. *See* Goldstein, *supra* note 2.

236. MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 73, 77-78 (1973); *see also* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 907 n.7 (1962) (describing court opinions that portray law enforcement as a compulsory act).

that despite a criminal prohibition on homosexual intercourse, he will instruct his office not to enforce the prohibition.[237] Or consider a police officer who overlooks personal consumption of marijuana in a public place. Or consider a housing authority official who allocates public housing to needy families while neglecting his duty to find housing solutions for homeless persons. To be sure, these behaviors can be described based on resource constraints: the state cannot prosecute all offenses, and many offenses are more harmful than homosexual intercourse. Similarly, a police officer cannot investigate all crimes, so he chooses to focus on the more serious ones. And finally, a housing official may decide that helping a needy but functioning family is a better use of societal resources than helping homeless persons whose chances of rehabilitation are slim.

But notice how contingent such explanations are. If we change the motive behind the official action, a very different picture emerges. What if the Attorney General believes that the homosexual sodomy offense is morally illegitimate? What if the police officer believes that there is nothing wrong with marijuana and that it should be legalized? And what if the housing official believes that homeless persons are not owed anything by society? Surely, in these cases we would point out that by prioritizing these officials are actually effectuating their agenda about the validity of the law or policy in question. Consequently, it would appear that resistance is present, except that it is done through a perfectly legitimate act—prioritization. In other words, the discretion the official enjoys facilitates resistance, which is also why prioritization as resistance is so difficult to detect.[238]

To be sure, the mere exercise of discretion in the course of the public official's work is both inevitable and desirable. But discretion can be used in a variety of ways. Resistance through prioritization is choosing which task to perform given certain constraints, but making that decision with the subjective motive to resist. On the surface, an outside observer will not be able to tell the difference between routine prioritization and prioritization driven by resistance. This makes such resistance more attractive.

F. Interpretation

The most common strategy of resistance is also the most mundane. Institutions, agencies, and officials are engaged in the act of

237. In Israel, the Attorney General instructed the police and prosecution not to investigate or prosecute cases of sodomy, then illegal under Israeli law. Alon Harel, *The Rise and Fall of the Israeli Gay Legal Revolution*, 31 COLUM. HUM. RTS. L. REV. 443, 453-54 (2000).

238. *See generally* Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717 (1971) (arguing that the structure of the law enforcement system allows police officers considerable, unchecked discretionary powers).

interpretation. Laws, administrative regulations, and court decisions require interpretation. Moreover, the interpreter is always interpreting something someone else wrote. This bifurcation between author and interpreter renders resistance possible, because it enables the law's addressees to escape the legal control the law seeks to place on them. Moreover, the greater the relational distance in this bifurcation, the more room there is for interpretive resistance. For example, if a particular agency only rarely encounters the prospect of judicial review, the interpretive gap between it and the court grows. The threat of sanction may thus be so remote as to not trigger any concerns.[239] Even if the agency is involved in litigation, money awards or litigation costs that often come at another institution's expense are not a successful deterrent, and thus do not create an optimal incentive to comply.[240]

One does not have to rehearse the entire indeterminacy debate[241] to see that legal texts are open to interpretation, that in many cases the texts do not preclude interpretational possibilities, and that those possibilities are (also) determined by the officials in charge of implementing these texts. In this sense, interpretation is both hardwired into our legal system and a strategy that can be utilized by officials contemplating resistance. Thus, an official can come to the conclusion that although the text (T) most likely instructs her to do X, she can do Y, make Y stick, while making a plausible case that Y is within the scope of T, even if she divines the drafter's intent and text as X. This ability corresponds with the limited ability of the removed author to monitor particular instances of resistant interpretations.

Indeed, the practice of interpretation as resistance may be so prevalent that we do not think about it in these terms. Interpretation is no longer thought of as "an exercise in fixed deductive logic," but rather as "an act of autonomous political creativity."[242] Think, for example, about a lower court judge who wants to resist the orders of an appellate court. The capacity of that judge to reconcile obedience to the higher court while evading its order through the act of distinguishing precedent or interpreting the superior court's holding is well

239. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

240. HALLIDAY, *supra* note 189, at 72, 104; Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). Levinson argues that officials respond to political incentives, not financial ones. *Id.* Consequently, making the government pay compensation will not achieve optimal deterrence. *Id.*

241. For a brief summary, see Lawrence B. Solum, *Indeterminacy*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 488 (Dennis M. Patterson ed., 1999).

242. Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 925 (1996).

known.[243] A case in point is Judge Parker's famous dicta in the South Carolina District Court about how *Brown* required an end to segregation, but not necessarily integration.[244] The division of labor between lower and higher courts lends itself to resistance. By giving lower courts fact-finding power which is only partially controlled by appellate courts, lower courts can make the facts "fit" their desired outcome, while knowing that a different spin on the facts will steer the result in a different direction.[245]

Of course, nothing in this is unique to courts. Although the mainstay of judicial work is interpretation, every official is engaged, at least some of the time, in interpretation. Problems of communication and supervision, discussed above, coupled with the relational distance between disparate institutions and officials, enable resistant interpretations. Consequently, the very act of interpretation can be viewed as subversive and undermining. Like the case of prioritization, it will be nearly impossible to distinguish a good faith attempt to apply the law from a subjective motive to resist and the resultant interpretation. Short of some external evidence that speaks to the official's state of mind, interpretation is perhaps the most covert form of resistance. Its prevalence makes it more attractive to deploy.

V. IMPLICATIONS

Dissenting from within is a fact of everyday governance. Still, what are we to make of this behavior? This Part briefly sketches out three possible types of implications: implications for legal theory, political life, and institutional design.

A. Legal Theory

Public officials resist the law. It does not follow, however, that they should. A legal theory, therefore, must account for the question whether public officials, as opposed to ordinary citizens, have a duty to obey the law and when that right might be applicable. Interestingly, although there is a vast literature on the general duty to obey the law, this literature rarely concerns itself specifically with the obligations of public officials. Rather, this obligation is simply assumed, viewed as unproblematic, or not even mentioned.[246]

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243. Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 212 (1978); *see also* Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 693 (1994) (finding evidence that ideological considerations allow circuit judges to "shirk" the policy preferences of the Supreme Court).

244. Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).

245. Murphy, *supra* note 65, at 1028.

246. Lyons, *supra* note 20.

For legal positivists the issue is almost a nonstarter. Positivists insist on the separation of law and morals.[247] For a positivist, because law has no binding moral authority in and of itself, there will be no meaningful difference between an individual and an official. As Joseph Raz has written, the law might merit our respect as a prima facie matter, but this can only amount to a reason to obey the law, rather than an obligation.[248] For positivists, resistance is a moral question not a legal one, and in that respect they do not make the distinction between individuals and officials explicit in their analyses.[249]

As the preceding discussion has demonstrated, however, there are important differences between citizens and officials. Public officials are in charge of making and applying law; they take special oaths to uphold it; the legitimacy of the state is bound up with and derived from their behavior. These differences, then, also go to the questions of whether officials have an obligation to obey the law, whether such an obligation is different from that of ordinary citizens, and if so, how.

The general question of whether officials are justified in resisting the law is complicated precisely because the issue of official resistance is multifaceted and cuts across institutions and roles.[250] Still, there is much room for theorizing. A legal theory addressing officials' duty to obey the law needs to disaggregate the concept of an official. For starters, there are elected and nonelected officials. The democratic pedigree of each is different; they are accountable to different communities, and they serve different purposes. Nonelected officials also differ from one another. We tend to have a different view, for example, of judges than of bureaucrats. Indeed, the relatively scant literature that has addressed the duty of officials to obey the law has almost always focused on judges, who are usually viewed as a special type of official who serve a particular function in the administration of justice and, as such, have unique moral, political, and legal obligations.[251] Even the debate about judges' obligation to obey the law tends

247. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

248. *See* RAZ, *supra* note 68, at 250.

249. *Id.* at 238-39. Raz makes only a cursory reference to officials when he dismisses oaths of office. Similarly, Hart's discussion of the official's duty to obey the law is not phrased in these terms. Hart was concerned with the administration of rules and rule application and less with the individual-official distinction regarding obedience. *See* Lyons, *supra* note 20, at 848 (describing the Hartian position).

250. A similar point was made by John Rawls regarding civil disobedience when he argued that "[w]e should not expect too much of a theory of civil disobedience . . . . Precise principles that straightaway decide actual cases are clearly out of the question. Instead, a useful theory defines a perspective within which the problem of civil disobedience can be approached." RAWLS, *supra* note 15, at 319-20.

251. *See, e.g.*, Anthony R. Reeves, *Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial-Reasoning*, 29 LAW & PHIL. 159 (2010); Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113 (1988).

to distinguish "wicked" legal systems from relatively just legal orders. There has been a significant amount of writing on the "wicked" legal systems, [252] but much less on relatively just legal orders.[253]

Thus, a useful legal theory should unpack what it means to be an official and should distinguish agent-neutral reasons from agent-relative reasons. The former are reasons for compliance that all officials have in common, whereas the latter are reasons unique to particular officials depending on their role, institutional location, and so forth. For instance, there are reasons to think that Gavin Newsom, the former mayor of San Francisco, precisely because he was an elected official, was somehow more justified in his resistance than the San Francisco County Clerk who might have taken the same action. Further, a legal theory might take into account not only the official's position in the governmental framework (judge, mayor, agency expert, street-level bureaucrat, etc.), but also the type of task the official is engaged in. For example, it is possible that the justifiability of resistance when interpreting the law will be different from the justifiability of resistance when the official is engaged in enforcement activity. On further analysis, it might very well be the case that different officials possess varying levels of duty to obey the law and that there is also a variance according to the specific official activity. As a corollary, official resistance may be more legitimate for some officials than others and in some contexts more than others.[254]

B. Political Life

An important implication of official resistance has to do not only with the intrinsic value (or disvalue) of such an act, but also with the utility or disutility such acts bring about. Public officials use resistance as a tool to achieve certain ends. The negative and positive outcomes associated with resistance, then, affect our normative evaluation. While the negative consequences of official resistance are familiar,[255] several potentially positive outcomes have not drawn sufficient attention.

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252. *See, e.g.*, COVER, *supra* note 21; DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY (1991). For positing this distinction, see RONALD DWORKIN, LAW'S EMPIRE 111 (1986).

253. *See, e.g.*, JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING (2010) (arguing that judges have moral reasons to deviate from the law even in cases where the result is simply objectionable rather than extremely unjust).

254. Recent work on the moral obligations of officials does not make the agent-neutral/agent-relative distinction, instead treating all officials as the same type. *See* STEVE SHEPPARD, I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS (2009).

255. The usual harms cited are damage to the idea of the rule of law, frustration of the expectations of citizens, harm to predictability and certainty, and decreased trust in the work of public officials.

1. Triggering Discourse and Unblocking Political Channels

Resistance can be a bold act. When done overtly, the official draws attention to her actions. Sometimes, the repercussions go beyond the act itself and can have a wider discursive impact. Consider again Gavin Newsom's decision to issue marriage permits to gay and lesbian couples in San Francisco. Coming on the heels of the Massachusetts *Goodridge* case[256] and growing nationwide support for civil unions,[257] Newsom's decision sparked controversy that went beyond the local dispute. It ignited a national dialogue. First, it contributed to the growing discourse on gay marriage. Newspapers, activists, lawyers, academics, and ordinary citizens, almost everyone had something to say.[258] As one commentator has written, the decision "put the first public face on married lesbian and gay couples."[259] Second, it increased pressure on officials to decide on an issue that, up until then, was relatively non-salient and also one on which they had been reluctant to speak. Soon after Newsom's decision, even President Bush had to address the issue, saying he supported a constitutional amendment banning gay marriages.[260] Third, discourse sparked real change, even if some of it was temporary. For example, following San Francisco, municipalities in Oregon, New York, New Mexico, and New Jersey enacted similar orders.[261] More substantial, however, was the reaction of thirteen states in 2004 to ban same sex marriage.[262] San Francisco's actions, and other court cases, were viewed to be responsible for this backlash.[263] Yet after Massachusetts and San Francisco, five states (Connecticut, Vermont, Iowa, New York, and

256. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

257. *See, e.g.*, Dennis Cauchon, *Civil Unions Gain Support*, USA TODAY, Mar. 10, 2004, at 3A (citing a USA Today/CNN/Gallup Poll finding that 54% of Americans support civil unions).

258. *See, e.g.*, Kate Kendell, *The Right to Marry and the San Francisco Experience*, 44 FAM. CT. REV. 33 (2006) (detailing the reaction to San Francisco's action, calling it "transformative," and its effect on popular ballot initiatives, among others); Robin Tyler & Andy Thayer, *The Gay Marriage Struggle: What's at Stake and How Can We Win?*, *in* 3 DEFENDING SAME-SEX MARRIAGE: THE FREEDOM-TO-MARRY MOVEMENT: EDUCATION, ADVOCACY, CULTURE, AND THE MEDIA 17 n.16 (Martin Dupuis & William A. Thompson eds., 2007) (arguing that San Francisco's action gave "strong impetus to pro-equality street activism around the country," most notably in Chicago).

259. DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 19 (2006).

260. *See* Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

261. *See* KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 10 (2006); PINELLO, *supra* note 259, at 19.

262. PINELLO, *supra* note 259, at 20.

263. Patrick J. Egan et al., *Gay Rights*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234, 256 (Nathaniel Persily et al. eds., 2008) (noting that the sharp backlash against gay marriage appears to have been short-lived).

New Hampshire) and Washington D.C. approved gay marriage.[264] The trajectory is less clear in other states.

Whereas San Francisco's resistance arguably generated support and sympathy for gay marriage, official resistance in the South after *Brown* was one of the main causes for the ultimate demise of segregation, resulting in the intervention of the federal government. *Brown* generated fierce resistance by Southern whites, officials and non-officials alike. This resistance, some of which was violent, was extensively covered in the media, thus alarming many Americans who up until then were not aware of the full extent of racial injustice in the South. This swung national opinion, formerly wary of forced desegregation, which was then translated into political pressure.[265] Though it is unlikely that Southern officials intended this particular result, it was nevertheless an important consequence of their decision to resist.

It is unclear whether these discursive explosions ultimately benefited the resisting officials. This assessment depends on what counts as a benefit. In the case of segregation and gay marriage, for example, resistance did make some officials popular with their constituency. Still, when we evaluate the effects of resistance, we should not look at it only, or at all, from the perspective of the resister. What matters are its societal effects. Official resistance, when it is overt and visible, places an issue on the national agenda in a way that regular discourse seldom achieves. Overt resistance is likely to be better than covert resistance at promoting dialogue and debate and bringing about meaningful social change. Visible official resistance, because it is exercised by those with authoritative power, is necessarily discussed and debated. Further, it forces engagement with the act and it allows others, non-resisters, to reflect on their own practices.[266] Thus, it can force action on behalf of superior officials and institutions. Resistance, then, is an opportunity to assess new choices and to engage with dissenters in the hope of reconstruction and renegotiation of existing power schemes.

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264. Connecticut: Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008); Vermont: An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, S. 115 (Vt. 2009); Iowa: Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); New York: Marriage Equality Act, N.Y. DOM. REL. LAW §§ 10-a to 10-b (2011); New Hampshire: An Act Relative to Civil Marriage and Civil Unions, N.H. REV. STAT. ANN. § 457:1 (2010); Washington D.C.: D.C. CODE § 46-401 (2010).

265. *See generally* KLARMAN, *supra* note 10.

266. *See* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 62, 67 (2010).

2. Signaling

In economics, signaling describes a way in which one actor may convey important, otherwise unobservable information to another actor.[267] In the context of official resistance, resistance signals, at least to the superior official or institution, a broken chain. It can highlight entrenched problems that might otherwise be overlooked, problems for which the particular act of resistance might only be a proxy. Resistance can serve as an important alarm for policymakers and administrators who are often in charge of complex networks where they have little control over particular processes and even less knowledge about the goings on in these networks.

As a corollary, and paradoxically, awareness of official resistance may even improve the rule of law. Social scientists have long noted how the more salient an event, the stronger it is etched in one's consciousness.[268] Extreme cases of official resistance, then, might be viewed as so repugnant and disturbing that they paradoxically contribute to a renewed respect for law, law enforcement, and compliance. Resistance might generate public anger and reinforce social norms about appropriate behavior.[269] It is possible, for example, that Southern resistance to *Brown* unfolded in such a way, eventually bolstering civil rights more generally and making racism and discrimination socially and legally unacceptable.

3. Policy Change

Official resistance might lead to policy change. The Eleventh Amendment was a direct result of massive state resistance to *Chisholm v. Georgia*.[270] The Kentucky land use case resulted in federal capitulation and the enactment of the Homestead Act. In those cases, official resistance might be considered favorable as it barred un-implementable and unrealistic policies. Official resistance in the South resulted in federal intervention that gave rise to the 1964 Civil Rights Act and the 1965 Voting Rights Act that sought to counter this resistance.

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267. *See* Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 358 (1973).

268. *See, e.g.*, Sven-Åke Christianson & Elizabeth F. Loftus, *Memory for Traumatic Events*, *in* 1 APPLIED COGNITIVE PSYCHOLOGY 225 (1987); John E. Newhagen & Byron Reeves, *The Evening's Bad News: Effects of Compelling Negative Television News Images on Memory*, 42 J. COMM. 25 (1992).

269. Emile Durkheim made a similar argument with regard to crime. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 58 (W. D. Halls trans., 1984); Jonathan L. Entin, *Responding to Political Corruption: Some Institutional Considerations*, 42 LOY. U. CHI. L.J. 255, 275 (2011) (making a similar argument regarding political corruption).

270. 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment,* U.S. CONST. amend. XI; *see* LESLIE FRIEDMAN GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT 161 (2001).

Of course, one could argue that official resistance does not necessarily bring about good policy changes, which makes judging its justifiability ex ante difficult, if not impossible. This is true, yet the point is not that resistance will only lead to good policy changes, but rather that it has the potential to do so. Indeed, it is doubtful whether official resistance would even be contemplated by certain actors if they did not think that there was at least a chance that their resistance would lead to a change in policy. These developments, then, should result in the rejection of our kneejerk reaction that militates against officials resisting the law.

4. Justice

Official resistance may serve the interests of justice when officials challenge unjust policies. While such resistance may generate important discourse that will also result in policy change, it can also be valuable for its own sake. Recall the example about the attorney general who refuses to prosecute persons who engaged in homosexual conduct. Although the attorney general must enforce the law, she believes that such an offense discriminates on the basis of sexual orientation. Or consider the case of a state department of health that decides to supply generic HIV/AIDS medication to indigents even if it violates federal laws protecting patents.[271] The health department justifies the move by explaining that many people cannot purchase life-saving drugs, but that it cannot afford the expensive patent-protected drugs, hence the turn to generic drugs that are a fraction of the cost.

While both of these examples may be controversial, they also arguably advance the cause of justice. Such acts of official resistance may end up changing criminal policy or pharmaceutical patent policy, but they also seek to do justice in the here and now. This aspect of official resistance is often overlooked because law is understood as an instrument that moderates power—without law, there can be no liberty. Consequently, the exercise of power outside law is suspect. And yet, power can also be used benevolently.[272] Officials have the power not only to act according to law, but also the opportunity to use state power for just causes.

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271. This example is based on South Africa's use of generic drugs to treat its population that could not afford the patent protected drugs. *See* William W. Fisher III & Cyrill P. Rigamonti, *The South Africa AIDS Controversy: A Case Study in Patent Law and Policy* (Feb. 10, 2005), http://cyber.law.harvard.edu/people/tfisher/South%20Africa.pdf.

272. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review).

To be sure, it does not follow that all cases of official resistance are similarly just. But granting absolute status to the rule of law has its price; namely, it can stand in the way of accomplishing desirable ends.

5. Efficiency

Official resistance may generate greater efficiency. Often, full compliance is either not attractive or it has the potential to thwart other important governmental objectives.[273] In other words, legal violations can be efficient where the prescribed legal arrangement leads to suboptimal results. In their study of regulatory compliance, Eugene Bardach and Robert Kagan explain how, in exchange for overlooking certain violations, regulators can achieve more meaningful compliance with administrative policy. In particular, they note that regulators often ignore violations that pose no serious risk and refuse to enforce regulatory requirements that are "especially costly or disruptive in relation to the additional degree of protection they would provide."[274] In addition, regulators often give extensions on deadlines that are statutorily mandated, even when they do not have discretion to extend them. They do so in cases where they believe the firm is acting in good faith and taking reasonable steps in its attempt to comply with regulatory standards.[275]

Although regulators often act in ways contrary to the legislation that regulates their activity, they do so because they believe (and empirical evidence supports this) that they can meet regulatory goals by not "going by the book," i.e. by not enforcing every regulatory provision. In this way, regulators can secure cooperation, gain access to information, and establish good working relations with regulated firms. In other words, this creates more efficient enforcement mechanisms.

C. Institutional Design

The preceding discussion sought to show that the outcomes of official resistance are not always negative, and quite often desirable. However, since official resistance is acted through institutional structures, issues of institutional design must be considered so that productive official resistance might be incentivized over unproductive official resistance. This can take several forms, such as the ex ante design of laws, policies, and institutions, and the ex post use of specif-

273. *See, e.g.*, Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743 (2005); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114 (2005) (arguing that excessive enforcement can discourage socially beneficial behavior).

274. EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 134 (Transaction Publishers 2002) (1982).

275. *Id.* at 138.

ic legal tools following instances of resistance. The precise design of such measures is beyond the scope of this Article, but some general points are sketched out below.

Legislation and policymaking means working to secure a coalition, drafting a bill, holding debates, making compromises along the way, and generating sufficient interest among the relevant actors, all of which require the investment of considerable political resources. It is no wonder, then, that at the enactment stage relatively little attention is paid to future compliance. But if official resistance happens, and supposing we seek to address it in some way, more effort should be given to this aspect from the beginning. Public policy scholars have long been engaged in the study of implementation, but for the most part they have focused on issues of design which hinder successful implementation rather than on public officials who actively resist the law.[276] Laws, then, should be designed with an eye toward compliance, and legislators should realize that enacting a law is not tantamount to its application.[277] Laws and policies that will be disregarded are generally a waste of legislative resources[278] and harmful to the ideal of the rule of law. Some of the tools which legislators might use include, but are not limited to, limited delegations, clearer articulation of legislative goals, weeding out conflicting objectives, and improving interagency cooperation. Such tools may be able to minimize resistance, but they also come at a cost: the potential curbing of positive resistance.

There is a glaring tension here. If official resistance is pervasive, even inevitable, how can officials design laws to promote implementation or compliance? How could these laws work if resistance is pervasive? And how could the mechanisms for promoting compliance be rendered immune from acts of official resistance? The answer, I think, must be that official resistance occurs on a spectrum. From the fact of its existence and inevitableness does not follow that it always exists everywhere and all the time. If official resistance is inevitable, this only means that legal structures cannot *fully* control it. It does not follow that it cannot be controlled at all. Consider, for example,

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276. *See* HILL & HUPE, *supra* note 5 (summarizing implementation research focusing on problems of interagency cooperation, limited resources, and conflicting legislative goals, but not on official resistance).

277. *See* Clune & Lindquist, *supra* note 126, at 1055-59 (1981) (arguing that the study of implementation yields information on how to design better policies); Fiona Haines, *Facing the Compliance Challenge: Hercules, Houdini or the Change of the Light Brigade?*, *in* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 287, 288 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011) (stating that law is rarely designed with compliance exclusively in mind).

278. I say "generally" because it is possible to imagine symbolic or populist legislation where there will be little expectation of compliance. Here, the expected official resistance will be part of the political game. Still, I think these cases are relatively rare.

the bureaucratic context, which has witnessed some transitioning from command and control regulation to forms of new governance.[279] Command and control regulation was responsible for the rule-based, top-down, hierarchical regulation. New governance regimes adopt a bottom-up approach, decentralize authority, move from rule-based to standard-based norms, and generally embrace a participatory, flexible, deliberative, and collaborative model of governance.[280] This trend, especially the move from rules to standards, might minimize some instances of official resistance for two reasons. First, authority and discretion is devolved to officials and regulated industries. It is they who construct the meaning of compliance,[281] which makes resistance to superior rules and directives less likely. Second, resistance to standards is more difficult. If official resistance means a subjective desire to resist the official's interpretation of the law, standards give her greater interpretive room, so that there will be less conflict between her preferences and her interpretive choice because of their contextual nature and the broader range of possibilities they entail.[282] While new governance regimes are designed with an eye toward incentivizing private sector compliance,[283] they also affect the work of bureaucrats who, together with industries, generate the standards to be followed.[284] This inclusive regime, then, makes opting-out less likely. My point here is not to praise new governance regimes so much as to underscore that compliance is not a binary concept; it can be manipulated through institutional design.[285]

A second way to manipulate the level of resistance is through special monitoring institutions. Although courts monitor resistance, their ability is limited, partly because they are a reactive institution and partly because resistance is often covert. But other institutions complement the work of courts. The Comptroller General (and other comptrollers), inspectors general, the Government Accountability Office, state ethics commissions, and others, all seek, explicitly or im-

279. *See* sources cited *supra* note 92.

280. *See generally* BARDACH & KAGAN, *supra* note 274 (discussing the legalistic nature of regulation and the transition to more flexible modes); Lobel, *supra* note 92.

281. *See, e.g.*, Shauhin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 LAW & SOC'Y REV. 527 (2009).

282. Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 30 (2008) (arguing that new governance makes compliance easier because principles are more sensitive to context).

283. Lobel, *supra* note 92, at 308, 311.

284. *Id.* at 312, 338, 343 (discussing how government agencies, including the EEOC and OSHA, assist firms in the development of plans that must meet performance requirements, which then have to be certified by the agency).

285. Indeed, not all new governance regimes are made of the same cloth. New governance can also mean more official resistance because regulators might forgo some legal requirements in order to achieve other, more important regulatory aims. *See* BARDACH & KAGAN, *supra* note 274, at 134, 138.

plicitly, to minimize the occurrence of official resistance. And yet relatively little attention has been given to their performance or to the authority and powers they wield.[286] Thus, an interest in official resistance entails an evaluation of the institutions that are charged with detecting such behavior.

Last, addressing official resistance means taking stock of such diverse tools as whistleblower protections, civil service law provisions, and disciplinary tools. These tools tend to view official resistance as a negative phenomenon that should be penalized. But our discussion has demonstrated that official resistance also brings about arguably positive results. Supposing we also seek to acknowledge and even incentivize instances of official resistance, the application of such tools and doctrines should be sensitive to the positive values that may be derived from the resistance they originally seek to minimize. This might mean that not every act of resistance should be reprimanded by taking disciplinary action. And perhaps not every act of resistance should be viewed harshly by comptrollers, inspectors, and various law enforcers. If official resistance also serves positive values, then this has implications for the design of institutions and doctrines that otherwise seek to minimize its occurrence.

We have a sweeping aversion toward official resistance. Given its costs, such as undermining the rule of law and creating uncertainty, this is understandable. Yet sometimes it may make sense to allow resistance. We might accept resistance, ex post, when we have sufficient information about its possible and real costs once it has been actuated. What is needed, then, is a fact sensitive analysis in specific cases that will inform the decisionmaking processes of monitoring institutions.

VI. CONCLUSION

Resistance and dissent are not unique to the private sphere vis-à-vis the state. Indeed, this Article has called for shifting the focus from private resistance to official resistance. Public officials who resist legal demands imposed by superior officials and institutions are not an anomaly in our legal system. Official resistance is an inescapable part of governance, in that it is derived from the basic institutional structures set up by law. Paradoxically, attempting to induce compliance leaves institutional structures susceptible to the very resistance they seek to avoid.

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286. *But see* Kevin T. Abikoff, Note, *The Role of the Comptroller General in Light of* Bowsher v. Synar, 87 COLUM. L. REV. 1539 (1987); Kathryn E. Newcomer, *The Changing Nature of Accountability: The Role of the Inspector General in Federal Agencies*, 58 PUB. ADMIN. REV. 129 (1998); James R. Richards & William S. Fields, *The Inspector General Act: Are Its Investigative Provisions Adequate to Meet Current Needs?*, 12 GEO. MASON L. REV. 227 (1990).

This Article demonstrated the various ways public officials go about resisting, from overt strategies to more covert forms. If resistance is indeed prevalent, there are implications which follow. I discussed some of these implications, especially those pertaining to legal theory, political life, and institutional design. Although it is natural to think of official resistance as harmful, there are instances where it might be thought of as normatively desirable. The problem is to identify the conditions under which beneficial official resistance occurs. For example, as aforementioned, overt resistance is likely to be better than covert resistance at promoting dialogue and debate and bringing about meaningful social change. To be sure, it very well might be that, all things considered, official resistance does more harm than good. I make no claim to that effect. But official resistance can also not be an either/or proposition. In order to evaluate its desirability and implications, an investigation is needed into its causes and effectuation.

Ultimately, the diffusion and inculcation of legal norms depend on a myriad of factors. Law cannot be understood in a vacuum, but rather as one system vying for supremacy among competing systems and constraints. Although we would like to think that, among public officials, law will prevail and other considerations will lose out, that is not always the case. As lawyers, this is especially difficult for us to acknowledge.

Official resistance demonstrates that the legal norm is shaped and constructed via a dialectical process, involving both superiors and subordinates. Power travels in both directions, from the maker to the implementer, but also back from the implementers to the maker. Thus, the study of official resistance sheds light on how officials perceive their role and on how a legal norm is diffused, internalized, or rejected by other legal actors. If we identify law with the state, and at the same time believe that it is the same law all the way down, then we are overlooking the fragmentation within the state that gives rise to instances of official resistance. Mapping forms of official resistance illuminates the workings of law in a world of potentially indeterminate norms, multiple institutions, and human individuality. Taking official resistance seriously means accepting law's only partial ability to constrain and compel official action.